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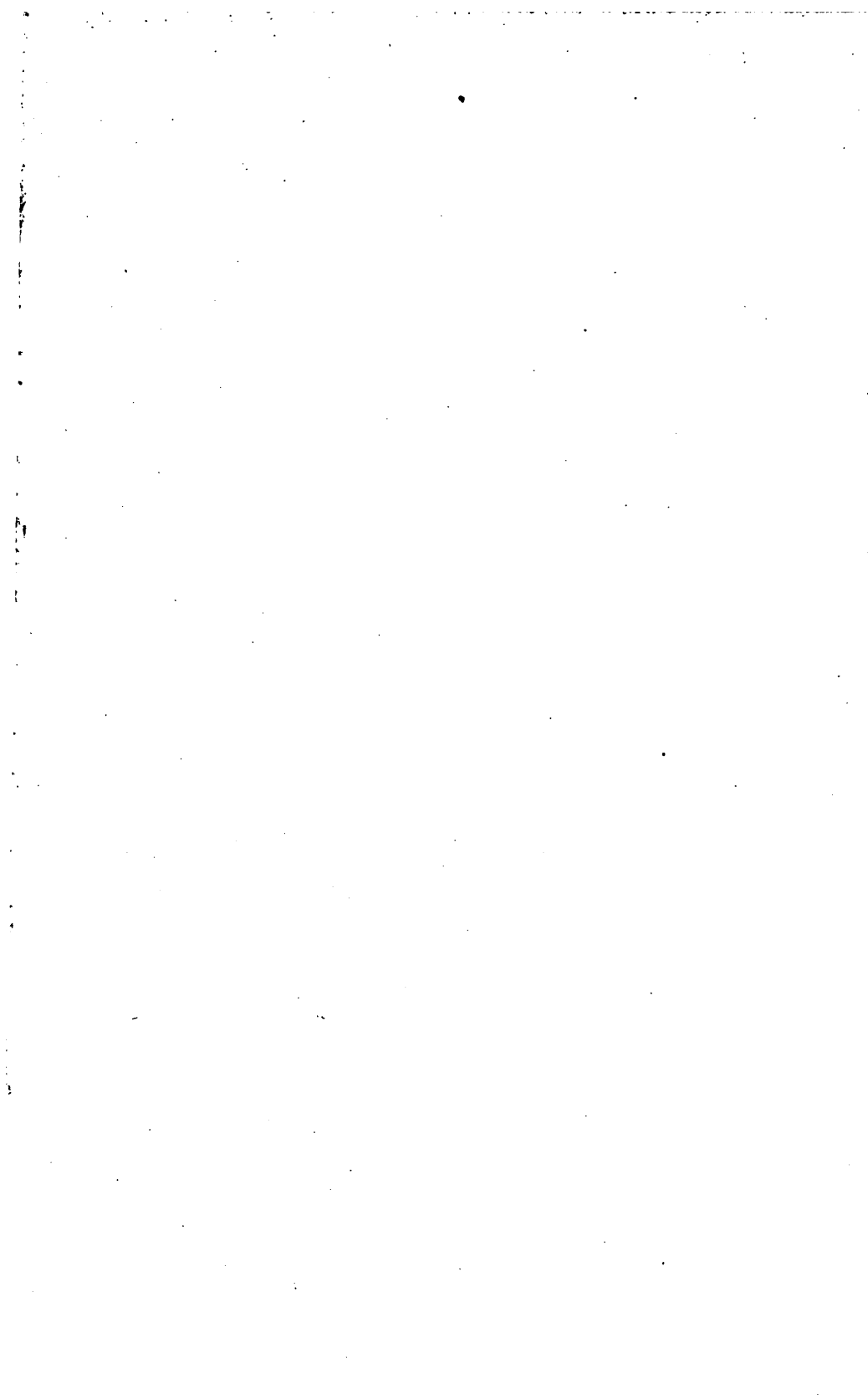


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STUDIES NATIONAL AND INTERNATIONAL

*BEING OCCASIONAL LECTURES DELIVERED IN
THE UNIVERSITY OF EDINBURGH*

1864-1889

BY

JAMES LORIMER

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PREFATORY NOTE.

THESE "Studies" were revised by the author himself, shortly before his death, with a view to their publication. They formed the subject of much thought and discussion, and were written with great care and deliberation, usually in the autumn vacation previous to their delivery. They originated in his custom of spending the first hour of the session, when the attention of the students could not well be concentrated on more special subjects of study, "in discussing in a popular manner what seemed to be the leading public question or public event of the day."

As the questions raised and the events discussed in these studies are still of vital interest, it is believed that the author's earnest hope was not unwarranted that they might prove useful and suggestive, not only to law-students, but to practical politicians and to thoughtful readers generally.

They have not had the benefit of the author's final revision, but the proof-sheets have been carefully read by Mr. John Kirkpatrick, Professor of History in the University of Edinburgh, who has given much valuable aid in preparing the volume for publication.

The Biographical Notices were written shortly after the author's death by one of his colleagues in the University and one of his *confrères* in the Institute of International Law respectively. The portrait which forms the frontispiece was painted by his son a few months before his death.

H. C. L.

KELLIE CASTLE,
PITTENWEEM, October 1890.

CONTENTS.

BIOGRAPHICAL NOTICES.

- By ROBERT FLINT, D.D., LL.D., Professor of Divinity in the University of Edinburgh, ix
- By GUSTAVE ROLIN-JAEQUEMYS, LL.D., formerly Belgian Minister of the Interior, etc., etc., xvii

LECTURES.

I.

ON THE SPHERE AND FUNCTIONS OF AN ACADEMICAL FACULTY OF LAW, p. 3

Objects and sphere of action of the University as a whole—The Faculty of Law ought to embrace the whole field of Social Science—Social Science not an academic novelty—Doctrine of Relative Equality taught by Aristotle—Proposed division of subjects in Faculty of Law, and directions in which it should be developed.

II.

PROFESSOR AYTOUN, p. 17

Character and Political Views of Professor Aytoun—Suggest reflections on Social Organisation—Relation of Liberty to Order—Value of recognised Social Gradations—Class distinctions in America, Great Britain, and Prussia.

III.

THE GERMAN WAR, p. 25

The German War of 1866; its causes and results—Monarchists and Democrats both claim results as triumphs for their respective parties—True light in which to view the war—Three special directions in which the war is instructive to Students of Public Law—Doctrine of the "Balance of Power" discussed—Equality of States and Equality of Individuals—Equally delusive ideas—Demoralising effects of the Violation of Treaties—Demoralising effects of "Pledges" on Members of Parliament.

IV.

REASONS FOR THE STUDY OF JURISPRUDENCE AS A SCIENCE, p. 37

Natural Law the Foundation of all Positive Law—Erroneous notions as to what is meant by Law of Nature—Definition of Law of Nature adopted by the Author—Blockade of the Southern Ports of the United States a mistake arising from ignorance of Natural Law—Importance of

Natural Law to the Municipal Lawyer, especially as a legislator or an author—Lasting value of Lord Stair's writings due to his recognition of the fact that the Art cannot be separated from the Science of Jurisprudence—Mr. Erskine's writings contrasted with Lord Stair's—Utilisation of Theoretical Studies for professional purposes.

V.

(1) THE INTERNATIONAL SIGNIFICANCE OF RECENT EVENTS, p. 53

Frederick Christopher Dahlmann—Prévost-Paradol's predictions as to the fate of France—His acceptance of the Revolution—Unsound character of the principles of Finality and of the Equality of Nations—Rules for a proposed International Congress.

(2) THE FRANCO-GERMAN WAR, p. 62

The principles of Paternity and Fraternity discussed—Organisation of the French and German Empires contrasted.

VI.

MONARCHY, REPUBLICANISM, AND DEMOCRACY, p. 66

Position and Character of the Queen and the Aristocracy in Great Britain—Different forms of Government discussed—Distribution of Wealth and subdivision of Land cannot be regulated by legislation.

VII.

THE INSTITUTE OF INTERNATIONAL LAW FOUNDED AT GHEENT, p. 77

Objects of the Institute explained by M. G. Rolin-Jaequemyns—Meeting of the Founders at Ghent, October 1873—Statutes voted at the first Meeting—Meeting at Brussels "for the establishment of an International Code"—Possibility of the establishment of an International Code and an International Tribunal discussed.

VIII.

THE "THREE RULES OF WASHINGTON" VIEWED IN THEIR RELATION TO INTERNATIONAL ARBITRATION, p. 88

Objections to the Rules of Washington and the Foreign Enlistment Acts in the name of Progress and of Peace—Principle of Freedom of Trade opposed to the principle of the "Three Rules"—Professor Bluntschli's Views on Neutrality discussed—Arbitration not condemned in condemnation of the "Three Rules"—Courts of Arbitration, their sphere and limits.

IX.

ENGLISH AND FOREIGN JURISTS AND INTERNATIONAL JURISPRUDENCE, p. 102

Mr. Gladstone and Alberigo Gentili—Scientific Jurisprudence Abroad and in England—The right of capturing private property at sea—Relative Equality—General principle of Neutrality—Obligations of the Neutral State in its corporate capacity—Limited responsibility of Neutral States viewed as aggregates of private citizens—Enlistment.

X.

OF THE DENATIONALISATION OF CONSTANTINOPLE, AND ITS
DEVOTION TO INTERNATIONAL PURPOSES, . . . p. 121

Cosmopolitan character of Constantinople—Recognition of Turkey by the Treaty of Paris—Russia and Turkey—Ultimate problem of International Jurisprudence—Suggestions for its solution.

XI.

DOES THE CORÂN SUPPLY AN ETHICAL BASIS ON WHICH A
POLITICAL SUPERSTRUCTURE CAN BE RAISED? . . . p. 132

Slaughter of the wounded and of prisoners of war by the Turks in the Russo-Turkish War of 1877—Recognition of the Turks as legitimate belligerents a breach of the Law of Nations—Results of such a course of action—One ethical ideal common to all religions—Its principles violated by the doctrines of the Corân—Prayer of the Sheik-ul-Islam—"Integrity and Independence of the Ottoman Empire" a *reductio ad absurdum*—Possible consequences of undertaking impossible obligations under the Foreign Enlistment Acts.

XII.

PROLEGOMENA TO A REASONED SYSTEM OF INTERNATIONAL
LAW, p. 148

Attitude of Occidental thought towards objective and absolute Law—Opposite point of view in the East—Progressive character of Philosophical Doctrine as opposed to Theocratic Dogma—System of International Law to be presented, not reasonable only, but reasoned—Fact the source and measure of Right and Duty—Perfection in relation the object of International Law—International Arbitration beyond the sphere of positive Law—Dr. Bluntschli on the ultimate problem of International Law—Value of International organisation.

XIII.

THE LAND QUESTION IN ITS SOCIAL AND POLITICAL
ASPECTS, p. 164

Amount of Food produced by land not the sole criterion of its value. Working-classes in town and country contrasted—Depopulation of the country—Multiplication of proprietors, large and small, desirable—True proprietorship—Political aspects of the question.

XIV.

OF THE IDEA OF THE FAMILY IN MODERN SOCIETY, . . . p. 177

Aspects in which the question is to be viewed—Influence of the Law of Contract on the Family—Position of Women in the Family—Individualism, Communism, and Communalism—Value of the Hereditary Principle—Hereditary Monarchs compared with elective Presidents—Indelible character of social distinctions—Distribution of Land—Suggested development of the Lyon Office and Heralds' Colleges.

XV.

- CENTRALISATION AND DECENTRALISATION, . . . p. 192
 Penuriousness of the British Government in the support of learning as compared with Foreign Countries—Proper application of the term Science—Centrifugal and Centripetal forces leading to Centralisation and Decentralisation in Society and the State—City life now and in former times—Objects and sphere of Home Rule—Centralisation and Decentralisation in International Relations—Importance of National Churches—Nations not independent, but interdependent.

XVI.

- POLITICS AS A PROFESSION, . . . p. 208
 Contrast between care with which Laws are administered and carelessness with which they are made—No great community can legislate for itself without individual interposition—Function of professional politician—Results of over-centralisation—Order, as a means to an end, primary object of legislation—Payment of Members of Parliament.

XVII.

- THE STORY OF THE CHAIR OF PUBLIC LAW IN THE
 UNIVERSITY OF EDINBURGH, . . . p. 222
 History the basis of civilisation—Faculties of Law in Scottish Universities from the earliest times—Institution of the Chair of Public Law in 1707—Occupants of the Chair down to 1832—Re-institution of the Chair in 1862—The future of the Chair.

XVIII.

- THE FACULTY OF LAW, . . . p. 243
 How far the views presented in Lecture I. have been accepted between 1864 and 1888—Practical and scientific conceptions of a Faculty of Law—Scientific conception has made greatest progress in recent years—Value of the study of Physical Science to the Jurist—Importance of the teaching of History to the Jurist—Drawbacks of education in England for Scottish gentry.

XIX.

- THE CHURCH AND THE BAR, . . . p. 254
 Relation between Theology and Jurisprudence—Idea of a Free Church realised—Theory of the Reformation as to Church and State—Reunion of Theology and Jurisprudence on the common ground of ethical Christianity—Practical suggestions for distribution of talent and energy between the Church and the Bar.

APPENDIX.

- LIST OF OTHER WORKS AND ARTICLES BY THE AUTHOR, . . . p. 263
 INDEX, . . . p. 265

BIOGRAPHICAL NOTICE.¹

THE death of Professor Lorimer is a loss which will be long and widely felt, alike on account of his excellence as a man, his eminence as a teacher, and his merits as a juridical philosopher.

He had a large circle of warmly attached friends, owing even more to his remarkably lovable and attractive character than to his rare intellectual gifts. His nature was constitutionally elevated and refined, aspiring towards things pure and high, as the flower seeks air and sunshine. Its culture was not superficial and taken on from without, but essential and grown from within; from the good seed in a good heart. He was a man of wide sympathies, gentle and kindly feelings; uniformly courteous and genial; quick to perceive and enjoy wit or humour, artistic or literary excellence; delighting to converse on almost any worthy theme, and fertile in ingenious suggestions; zealous for the improvement and reputation of the University to which he was proud to belong; and warmly patriotic, while generously appreciative of the good qualities and achievements of foreign nations. In ordinary conversation or business discussion, as in his writings, the views which he expressed might, at times, be felt to be somewhat unpractical, but the reason could always easily be seen to be some ideal too good for realisation in the circumstances. His proposals never missed their mark from being aimed too low; they might occasionally do so from being aimed too high. Better friend or colleague could not be desired. It was impossible to know him without respecting and loving him.

His appointment, in 1862, to the Chair of Public Law in Edinburgh was a most fortunate event for the University and for the credit of Scottish juridical science. Previous to his appoint-

¹ Reprinted, by permission, from the *Juridical Review* of April 1890.

ment he had by several publications amply shown his fitness for the office, and even had he not been appointed he would doubtless have continued to make occasional not unimportant contributions to political philosophy and jurisprudence. But it is not to be supposed that he would have written a treatise like that on which his fame will chiefly rest if he had not had the duties and the leisure which his professorship gave him. In all probability, unless he had become Professor of Public Law, Scotland would have been unable to claim the honour of having produced during the present century a single philosophical jurist of European distinction. For he stands alone in his century so far as the Philosophy of Law in Scotland is concerned. The history of that department of thought is between him and Miller an entire blank in this country; and Miller died in 1801. Indeed, strictly speaking, even Miller has little right to be named in this connection, as neither of his works dealt directly with the philosophy of law, but with the evolution of society and government. Weakness of voice, and in late years general physical feebleness, must have injured Professor Lorimer's effectiveness in the reading or delivery of his lectures. But to worthy pupils he could not be other than an inspiring and influential teacher, communicating to them broad and attractive views of ethical and juridical truth, leading them into new regions of inquiry and speculation, and revealing to them the high significance and real ends of the profession to which they (or most of them) looked forward, by showing them its proper place in the social organism and its relations to the universal and Divine life. He had in an altogether exceptional measure these qualities of the successful lecturer,—a moral enthusiasm which could not conceal itself, originality, elevation, and ingenuity of conception, and naturalness and elegance, not infrequently even raciness and eloquence, of expression.

It was as a philosophical jurist that Professor Lorimer occupied the high place which he held among European thinkers. It may not be irrelevant to indicate the chief influences which may be safely deemed to have formed and moulded his character as a thinker and his system as a jurist.¹ Heredity, doubtless, counted

¹ In this paragraph I have followed the guidance of extracts, kindly made for my information, from a ms. of my deceased friend. The sentences within quotation-marks are from these extracts.

for much in his disposition and genius. His ancestors were of good position and good repute; his father and grandfather were land-factors and land-lawyers, as also land-proprietors. The surroundings of his early youth were admirably fitted to foster and elicit all delicate sensibilities and healthy tastes. The charms of Aberdalgie produced ineffaceable impressions on his memory and heart. "During sleepless nights in after-years he used in imagination to fish down the burn which ran past his father's house from the deep pool below the waterfall to its junction with the Earn." At Perth Grammar-School, and in his first year at Edinburgh University, he showed no special studiousness; but a short apprenticeship in a merchant's office in Glasgow "opened his eyes to his own likes and dislikes, and gradually there grew up in him a passion for knowledge of all kinds." When he returned to Edinburgh University it was with a mind thoroughly awake. Sir William Hamilton made a powerful and permanent impression upon him. "To him," he says, "I probably owed more intellectually than to any other man." For some of Sir William Hamilton's theories he cared little. He wished that he had "let the quantification of the predicate alone." But in him he first came into contact with a vast intellectual force and a really great scholar. Through him he became convinced of the insufficiency of a Sensationalist Philosophy and of a Utilitarian Ethics. And while he derived from him, of course, no notions of law (Sir William Hamilton, although a lawyer, being of all the Scottish philosophers the one who theorised least on law), yet he learned from him to appreciate Hutcheson, Ferguson, Reid, and others of the Scottish school who had dealt with the fundamental principles of jural science in a truly philosophic spirit, and had awakened by him the desire to become acquainted with the doctrines of the chief Continental thinkers. The teaching of Hamilton could not have been more appropriately followed up than it was,—namely, by three years of travel and study abroad. These years, from 1840 to 1843, greatly enlarged young Lorimer's knowledge, experience, and sympathies. In no case would he have been, like so many of his countrymen, an insular man; but his residence abroad made him a fully international man—a most important qualification for one who was to be an expositor of international law. Both at the Academy of Geneva and the University of Berlin, the courses of instruction

from which he felt that he derived most benefit were on physical science—at Geneva that of Pictet de la Rive on Zoology, and at Berlin that of Mitscherlich on Chemistry. The clearness with which Mitscherlich exhibited “the dependence of physical phenomena, amidst all the changes which they underwent, on unchangeable and inflexible laws” led him to conclude that it must be equally so with social phenomena, and caused him to be disappointed with the way in which Puchta, Savigny’s successor, applied the historical method to the study of Roman Law. “I learned more law from the chemist than from the jurist, and my own ultimate theory of scientific jurisprudence was more influenced by the former than by the latter.” He attended Trendelenburg’s lectures on *Rechtsphilosophie*, but without sufficiently understanding them to be influenced by them. It was only after he had independently reached and propounded the same general results as those which were set forth in the *Naturrecht auf dem Grunde der Ethik*, first published in 1860, that Trendelenburg came to be regarded by him as an authority. His relation to Trendelenburg was, like his relation to Krause and the jurists of the Krausean school, one of admiration founded on agreement as to essential principles independently reached. At Bonn he entered more deeply into German philosophy and the spirit of German science and life than he had been able to do at Berlin; and there he came under the influence of Dahlmann, to whom of all his German teachers he owed most. The strong, manly personality, the large and accurate science, the political independence, the practical earnestness, and the clear and pointed style of Dahlmann greatly attracted him. “After Sir William Hamilton, I believe that I owe more to Dahlmann, intellectually, than to any other man. These two, and Aristotle, stand out quite apart as the sources of my philosophical and political inspiration. But it was Dahlmann who first brought me face to face with my special calling, and I shall never forget the impression he made upon me by the opening words in which he set his own problem and ours before us:—*Man muss die menschlichen Dinge weder beweinen noch belachen, sondern sie zu verstehen trachten*—‘we must neither weep over human affairs, nor laugh at them, but try to understand them.’”

After returning to Edinburgh, Mr. Lorimer passed through the necessary law-classes in the University, and, in the spring of

1845, was called to the Bar. Not succeeding in the practice of his profession, he continued to extend his acquaintance with its theory, and took to writing in the Reviews. The energy with which he applied himself to literary work as soon as he saw it to be the only kind of work immediately obtainable, betokens a resoluteness of spirit which remained conspicuous in him to the last. He early became an earnest advocate of the reform of our higher educational institutions. He applied himself, in particular, to the examination of the fundamental principles of politics. He read the chief ancient and modern treatises on the subject, and found that of Aristotle to be the wisest and most instructive of them all. His merits as a political thinker were brilliantly attested by his *Political Progress not necessarily Democratic*, published in 1857. It is a wise, original, ingenious book,—one not unworthy to be placed by the side of J. S. Mill's *Considerations on Representative Government*. It had a particular practical aim, but it also implied a carefully and independently thought out general theory of government and of society, and clear and decided views as to the methods by which political truths are to be ascertained and verified. It is probably the best treatise on the principle of equality extant; the one which shows most accurately the sense in which the principle is true and the senses in which it is false, and how the true and false interpretations of it most affect social and political life. The mode in which Mr. Lorimer proposed to give practical realisation to proportional or relative equality in the election of representative legislators is not one which has commended itself to statesmen or the community, and the book has, perhaps, somewhat suffered in popular esteem in consequence. The practical application, however, is almost the only thing reasonably disputable in it, and the value of the work is largely independent of the acceptance or rejection of that portion of it. *The Constitutionalism of the Future*, published nine years later, if less original in thought, is even more vigorous in style. The sketches of the "Whig" and the "Conservative" are masterpieces of verbal portraiture.

The most important of Professor Lorimer's publications are *The Institutes of Law* and *The Institutes of the Law of Nations*. They are constituent parts of a self-consistent scientific whole. The first treats of the law of nature, and of positive law in

general, of their sources, and of their relations to each other; or, in other words, of the universal principles of jurisprudence. The second treats of the law of nature as realised in the relations, both normal and abnormal, of separate political communities; it consequently implies the principles exhibited in the former treatise, while setting forth international law as derived from, and declaratory of, natural law. Together they present a comprehensive view of jurisprudence as a whole, and a developed view of a most important and difficult department of it. Only the merest indication can here be given of some of the more general characteristics of the system of thought exhibited in them.

Its philosophical spirit is the most conspicuous. Professor Lorimer constantly shows himself not less of a philosopher than a lawyer. He never dissociates law from philosophy; never so emphasises what is specific in the kinds of law as to obscure the unity of all law; always keeps clearly before his own and his readers' minds the dependence of the various forms of law on its essential nature, and the organic connections between jurisprudence and the other branches of science. He has left us, accordingly, what can be designated with perfect appropriateness a *philosophy of law*, and has removed from the Scottish school of philosophy the reproach of having produced no thinker who had investigated systematically so important a province of inquiry. He may fairly be claimed as belonging to the Scottish school, and his theory of universal and international law as a genuinely native product, although he certainly cannot be charged with standing in a servile relationship to any Scottish predecessor, or with being unwilling to receive the truths taught by foreign contemporaries. While not blind to the real services of Bentham and Austin, he saw clearly the shallowness and arbitrariness of their general ethical and jural doctrine. He opposed it in the best and most effective manner—viz. by substituting for it one far more solid and satisfactory. I can hardly suppose that any pupil of his has lapsed into the Austinian superstition long so dominant to the south of the Tweed.

The religious spirit which manifests itself in Lorimer's system of jurisprudence is another of its characteristics. Tracing law back, not to enactment, but to nature, he referred it ultimately to the nature of God. The primary source of law, he holds, is God; the

Author of all existence must be the postulate of all science ; whatever views of society, of politics, or of history, are inconsistent with belief in the being, government, and goodness of God must be erroneous. Although his religious faith, however, impressed itself on his scientific system, he is not to be numbered among the adherents of the Theological School of Jurists. He had no sympathy with their dogmatic narrowness ; maintained none of their exclusive pretensions ; derived none of the propositions of his jurisprudence from *a priori* knowledge of the Divine nature or special revelation of the Divine will ; received as laws of nature and jural relations only what he believed to be rationally and inductively established. Accurate and comprehensive insight into the connections and distinctions between ethics and jurisprudence is another feature of the thought embodied in his philosophy of law. This feature strikingly differentiates his system from that of Austin ; it constitutes its chief resemblance to that of Trendelenburg. The chapters on the distinction between perfect and imperfect obligations, the identity of justice and charity, and the relation of equality to liberty, and the chapters on the sources and objects of positive law, fully show the vast advantage possessed by a jurist who has a large and firm grasp of ethical principles.

The method of investigation followed in the Institutes is another characteristic to be noted. It gives its due place to deduction, of which most ingenious use is made in the derivation of the various essential natural rights of man from the right to existence given in the fact of existence. It places chief reliance, however, on induction, and recognises its legitimacy alike as psychological or subjective, and as historical or objective. The historical form of induction is subordinated to the psychological, but it is largely applied. It may, perhaps, be justly held that the inseparability of the psychological and historical methods is not fully recognised ; but even if so, the scientific breadth, truthfulness, and completeness of the method exemplified in the Institutes must be held to be one of their distinguishing merits.

I must add that Professor Lorimer's teaching as a jurist was not less marked by its practical than by its philosophical character. There may be an impression among some to the contrary. But among whom ? Only among the vulgar-minded, for whom all earnest thought about ethical and jural principles is

visionary, all wide sympathies and general aims unpractical, and who degrade the noble profession of Law by carrying into the practice of it ignoble motives and methods. Not among any of the late Professor's compeers, among any of his associates of the Institute of International Law, among any jurists of real eminence, or even among any intelligent readers of his works. All such will acknowledge that, if he sometimes put forward plans incapable of being realised, this arose not from unpracticalness or visionariness, but from the very intensity of his practical tendencies, or, as M. Rivier aptly says, from "*le besoin de donner aux idées un corps, de les traduire en choses concrètes et tangibles.*"

His treatment of many of the questions connected with International Law will be felt to be extremely interesting even by non-professional readers, but, of course, an international jurist alone can do justice to it. I must refrain, indeed, from touching even on his activity in the advocacy of political and educational reform, his share in the foundation and labours of the Institute of International Law, or his literary work in general. The mere amount of his literary work is very remarkable, considering that his health was never very robust. The explanation of it is partly his brave and indomitable spirit, and partly the freedom from all avoidable care secured to him, and the sympathetic and effective aid given, by those whose lives were closely bound to his.

His name is honoured among the thinkers and jurists of Europe. Scotland may well keep his memory fresh and green, and feel grateful for the services which he has rendered her. Posterity will be able fully to realise the appearance of his outward man, for that has been portrayed with a rare truthfulness and beauty which tell alike of the skill of the artist and the affection of the son. It is to be hoped that there may also be given to the world an adequate record of his life in its whole development.

R. FLINT.

JAMES LORIMER.

(Extrait de la *Revue de Droit International*.)

C'EST avec une douleur profonde que j'ai à mentionner ici une nouvelle perte que viennent de faire la science du droit, l'*Institut de droit international* et la rédaction de cette revue. M. James Lorimer, professeur à l'université d'Édimbourg, membre de l'Institut de droit international, a succombé jeudi 13 février 1890 à une pleurésie. Quiconque le connaissait par ses écrits a pu admirer la solidité et l'étendue de ses connaissances, sa science, l'élévation de ses idées, l'indépendance de sa pensée, la générosité de ses aspirations. Mais ceux à qui il a été donné, comme à celui qui écrit ces lignes, de connaître personnellement James Lorimer ont pu apprécier, en outre, combien en lui toutes les qualités du cœur et de l'esprit se fondaient en cet ensemble harmonieux et rare, qui s'appelle la vertu dans la plus haute acception du mot. On ne savait, en le voyant, quel sentiment devait l'emporter, de l'affection ou du respect. Doux et juste à la fois, modeste pour lui-même, plein de bienveillance pour les autres, il s'éclairait dans l'étude et l'enseignement du droit par les lumières du cœur en même temps que par celles de la raison, et mettait en pratique ce qu'il écrit dans un de ses meilleurs ouvrages, sur l'union nécessaire et l'identité finale de la charité et de la justice.¹

Sans doute, la vie et les œuvres de M. Lorimer feront, dans la prochaine réunion de l'Institut de droit international, l'objet d'une étude complète, que cette revue se fera un devoir de reproduire.² Mais on pardonnera à mon amitié et à mes regrets de ne pas attendre jusque-là pour rappeler, d'après des souvenirs et des impressions personnelles, quelques traits de cette physionomie, noble et sympathique entre toutes.

La première fois que je vis M. Lorimer, ce fut à Gand, le 7 septembre 1873. Le lendemain devait se réunir dans la vieille

¹ V. dans les *Institutes of Law* tout le chapitre intitulé: "Of justice and charity," p. 314 et suiv.

² No General Meeting of the Institute of International Law has been held this year (1890).

salle de l'Arsenal, à l'hôtel de ville de Gand, la conférence appelée à fonder l'Institut de droit international. J'avais en ce moment la bonne fortune de voir groupés chez moi presque tous les hommes éminents qui, de divers côtés, avaient bien voulu répondre à mon appel. Bluntschli, Mancini, Moynier, De Laveleye, Calvo, Asser, Pierantoni étaient arrivés. Tous ces hommes, qui se connaissaient par leurs œuvres, se trouvaient pour la première fois en présence les uns des autres. Dudley Field, en route de New York pour Gand, était attendu. Westlake, tombé malade peu de jours auparavant, n'avait malheureusement pu entreprendre le voyage. On introduisit M. Lorimer. Il avait près de cinquante-cinq ans à cette époque, mais paraissait, au premier abord, plus âgé. Une affection du larynx ne lui avait plus laissé qu'une voix faible, la taille était un peu courbée, et la faiblesse de la vue donnait à la démarche quelque chose d'incertain et d'hésitant. Mais quel regard profond, intelligent et bon traversait ces lunettes de myope, et combien, une fois la conversation engagée, la réelle jeunesse de l'âme se reflétait dans cette physionomie fine et distinguée, qu'animait par instants le plus bieuveillant et le plus loyal des sourires !

Cette jeunesse de l'âme, cette foi dans la science, cette fraîcheur, je dirai presque cette candeur de la pensée, M. Lorimer les conserva jusqu'à son dernier jour. J'en ai sa correspondance pour preuve. Il tenait de sa patrie, l'Écosse, et de son maître, Sir William Hamilton, une disposition spéculative, encore développée dans ses études aux universités de Berlin et de Bonn. Sa sérieuse originalité a consisté à transporter le résultat de ses études philosophiques, religieuses même, dans le domaine du droit et de la politique. En cela, il se rapprochait de Bluntschli, pour lequel il a toujours, d'ailleurs, professé la plus vive admiration, et il se distinguait de la majorité des jurisconsultes de nos jours, peut-être trop enclins à considérer la métaphysique comme peu compatible avec la précision indispensable au droit. Par contre, si le philosophe se retrouvait dans le juriste, celui-ci influa sur le philosophe. Il en résulta dans tous les livres et dans les nombreux articles que Lorimer écrivit pour la *North British Review*, pour la *Revue d'Édimbourg*, pour la *Revue de Droit international*, etc., une tendance commune, à la fois spéculative et pratique, une sorte de synthèse réaliste, une disposition à se mettre au-dessus des difficultés du moment et à concevoir un ordre juridique meilleur fondé en raison, tout en s'appliquant à ne pas tomber dans l'utopie, et en tenant compte de la réalité des faits. Tel est le caractère qui se retrouve, notamment dans les trois œuvres les plus remarquables de notre ami : *Constitutionalism of the future*, *Institutes of Law*, *Institutes of international Law*.

J'ai publié dans cette revue¹ un essai critique assez étendu sur le système philosophico-juridique exposé par M. Lorimer dans les deux derniers de ces ouvrages. Je n'y reviendrai pas. Quant au *Constitutionalism of the future*, c'est l'application à la politique, et spécialement au droit de suffrage, du principe conservateur de l'égalité proportionnelle (τὸ κατ' ἀξίαν ἔσθ' ἐν) d'Aristote.

Lorimer avait foi dans les destinées de cet *Institut de droit international* qu'il avait contribué à fonder. Empêché depuis plusieurs années, par l'état de sa santé, de faire les voyages nécessaires pour assister aux sessions, il ne cessa jamais de s'intéresser vivement aux travaux de l'Institut, et de demeurer en correspondance suivie avec plusieurs de ses membres. Jusque dans sa dernière maladie, et aussi longtemps qu'il put se faire illusion sur la gravité de son état, il s'attacha à l'idée de voir choisir Édimbourg comme lieu de la prochaine session, et de pouvoir ainsi, une dernière fois, se trouver au milieu de ses collègues. "*He clings to it,*" m'écrivait peu de jours avant sa mort la compagne chérie et dévouée, dont la tendresse inquiète entrevoyait déjà le dénouement fatal. Et nous aussi, ses amis de tant d'années, nous nous attachions avec ardeur à l'espérance de voir une fois encore en cette vie, entouré de la tendresse des siens, de la vénération et de la reconnaissance de ses concitoyens, de ses anciens disciples, celui qui représentait au plus haut degré, au sein de l'Institut, l'alliance de la philosophie et du droit. Il est mort, m'écrit-on, dans la pleine possession de sa haute intelligence, et sa fin a été douce et sereine. Comment pouvait-il en être autrement? Il a professé toute sa vie le culte de la justice éternelle, qu'il ne distinguait pas de l'éternelle bonté. Il avait la double espérance du mieux en ce monde et du bien suprême au delà. Il était de ces natures privilégiées que l'on ne peut se résoudre à voir mourir entièrement, et qui aident à croire à l'immortalité.

G. ROLIN-JAEQUEMYS.

¹ *Les principes philosophiques du droit international: Examen critique du système de M. J. LORIMER*, t. XVII, 1885, p. 517 et suiv.; XVIII, 1886, p. 49 et suiv.

LECTURES.

“Society, once tempted by flattery to believe itself the *source* of moral law, is ever sliding towards dissolution ; but, while reverently living as its product and its organ, becomes ever firmer and more glorious.”

MARTINEAU.

I.

ON THE SPHERE AND FUNCTIONS OF AN ACADEMICAL FACULTY OF LAW.¹

The Introductory Lecture to PROFESSOR LORIMER'S Course of
1863-4, delivered to the FACULTY OF LAW, 5th January
1864.

IT does not, in my opinion, belong to the duties of a professor in a University, and I am not very sure that it is consistent with them, that he should deliver popular lectures, even though these lectures should have reference to the department of study which he has been commissioned to teach. I by no means say that, in deference to the scientific character which ought to belong to academical prelections, a professor is bound to exclude those aspects of his subject which may kindle the imaginations or touch the hearts of his auditors. In dealing with the sciences of human life, above all, a genial, humane, and sympathetic mode of treatment is not only reconcilable with, but is inseparable from, any method which is likely to be either scientifically trustworthy or practically useful. "The tree of life is green;" and he who, by dealing with it as an inorganic structure or a leafless abstraction, draws from it its sap, has little chance either to invigorate its roots or to expand its branches. Still, the primary duty of the University teacher is to enlighten the understandings of his pupils, and to show them the links that bind the acknowledged objects of human endeavour to specific rules of human conduct, rather than to awaken unsatisfied longings, or to convey indefinite conceptions of the beautiful and the good. For these reasons it has not been the custom, either in this or in other Universities, for the professors to introduce their subjects by popular discourses, and it is very far from my intention to inaugurate such a custom.

On the other hand, however, it is a time-honoured usage elsewhere—and one which, I believe, it is the wish of some of

¹ Reprinted from the *Law Magazine and Law Review*, Feb. 1864.

my colleagues, as well as my own, that we should adopt—for the professors of the various faculties, from time to time, to deliver lectures of a more general character than those which they would address to the students of their own classes; and that these lectures should be delivered *publice*, as it is called in Germany; that is to say, that all the students of the faculty under which they fall should be invited to attend them. At the beginning of each session it is probable that, in future, such a lecture will be delivered in the Faculty of Law; the professors dividing the duty amongst them, and lecturing in rotation. It is as the first fruits of this arrangement that, though somewhat late in the session, I pray you to accept the lecture which I am about to deliver to you.

The subject which I have chosen, as you know from the advertisement, is the "Sphere and Functions of an Academical Faculty of Law." In selecting as the subject of a single lecture a wide, and, as I shall have occasion to show you, in many directions an unexplored domain—and this, too, with the avowed object of tracing its boundaries—I have not been so vain as to imagine that I should be able to present you with a definition of it that would satisfy the ultimate requirements of science. I fully assent to Mr. Mill's remark,¹ that a definition, "like the wall of a city, has usually been erected, not to be a receptacle for such edifices as might afterwards spring up, but to circumscribe an aggregation already in existence." The observation, I imagine, is as true of a scientific faculty as of a science—here, too, the definition must follow, not precede, the creation of the object defined—and, in this country at all events, a complete scientific faculty of law is, as yet, an object of anticipation and of hope rather than of experience. All that I aspire to, then, for the present is what the writer from whom I have just quoted has characterised as "an anticipation, or *ébauche*, of a definition"—such an indication of the region which has been assigned to us as may enable us to take secure possession at any rate of its central provinces, and to determine the directions in which it will be safe to turn the tide of future explorers.

What, then, is the sphere, social and scientific, which belongs to the faculty of law of a completely developed University, which is fully and efficiently discharging its functions as an organ of the state?

In order to the solution of this question, you must permit me, in the first place, to call your attention, in two or three sentences, to what I believe to be the objects and consequent sphere of action of the University as a whole. It has always appeared to me that

¹ *Essays on Polit. Econ.* V., p. 120.

the true and ultimate conception of a University was very well conveyed by the word itself, taken in the sense of a school of learning embracing *all* the sciences. It is this sense which its etymology suggests, and which we now popularly attach to it; nor have I ever been convinced that such was not also its historical meaning. The latter point, however, has been controverted by so high an authority as to forbid that I should assert it with equal confidence. Sir William Hamilton, in one of those luminous "discussions" with which most of you, no doubt, are, and with which all of you ought to be, acquainted, has poured out a flood of learning on the term *universitas*, and its still more ancient synonym, *studium generale*. With the special object which Sir William had in view I need not trouble you; nor shall I venture to question that, as the result of the very suggestive digression into which that object led him, he has placed beyond all doubt the fact that many of the most famous institutions to which these epithets were applied were directed—like many modern Universities—to the culture only of particular fields of knowledge, and embraced only certain faculties. That these institutions, moreover, were in the habit of granting degrees only in those branches of knowledge which they taught, and that the fact of their enjoying the social immunities then attaching to Universities did not entitle them, inferentially, to travel beyond the fields in which they had been legally seized and vested by their founders—whether these founders were Popes or Emperors—are facts which Sir William Hamilton's historical instances have proved, quite consistently with what the reason of the case would have indicated. I confess, however, that I have failed to see the necessity of the inference which he derives from these facts, to the effect that a University, "in its original and proper signification," did not mean "a school teaching all the faculties;" and that the meaning of *studium generale* was "not that all was taught, but that what was taught was taught to all."¹ In support of the latter construction he produced but one ancient authority, not, as it seems to me, of sufficient weight to overturn what in modern times has certainly been the general understanding of the learned. The nearest English equivalents to the term *universitas*, in its Roman signification, as Sir William Hamilton himself has remarked, are *society*, *company*, *corporation*.² Let us take the last. Now the allegation that a certain class of corporations contemplated certain objects could never surely be disproved by the discovery that a number of corporations of this class had existed which were deficient some in one, and others in others, of the means which were then known, or were afterwards discovered, to be requisite for the complete attainment of those

¹ Discussions, pp. 481-2.

² *Ib.*, p. 478.

objects. Such facts would prove only that in their actual condition they did not fulfil the whole ends of their existence,—that the real was not coextensive with the ideal. As in their actual state scarcely two of these institutions were alike, to assert that the general conception of them must correspond to their actual condition would be to deny that any general conception of them was possible. On the other hand, as no one faculty or branch of knowledge can be mentioned which was wanting in them all, to assert that the general conception of them excluded any branch of knowledge would be to limit it so as to exclude some of the examples which, *ex hypothesi*, must fall within it. That many human bodies are undeveloped, that others are decayed, and that those of a third class are mutilated, and have lost arms and legs, and eyes and noses, does not prove that the human body, as such, partakes of the imperfections which we may find in any number of individual specimens. Physiologists tell us that there is no such thing as a perfectly sound human body, and that if Diogenes had turned out to seek a well-grown and healthy man, he would have been just as unsuccessful as when he went to seek an honest one. But everybody understands, nevertheless, how many legs and arms, and other members, go to make up a man; and our notions of a man are not less clear and definite though none of us, perhaps, ever saw a perfect specimen of his own species. In like manner, it seems to me that the meaning which all of us in modern times have been in the habit of attaching to a University, and which any one naturally would attach to a *studium generale*, that, viz., of an institution directed to the cultivation on the one hand, and the dissemination on the other, of all the sciences, is the correct one; and that this meaning is not invalidated by any imperfections which such institutions may have exhibited in less advanced stages of society or even which they may exhibit *now*. If such be not the correct view of the matter, I am not antiquarian enough to tell you when the modern conception of a University, in its integrity, became prevalent. That it was fully realised, however, by the founders of our own University, in 1582, is a point on which the Foundation Charter of King James VI. fortunately leaves no doubt. In mentioning the objects of his new institution, after making provision *pro receptione, habitatione et tractatione* of professors of the four existing faculties, he adds, *aut quarumcunque aliarum liberalium scientiarum*. Commenting on the latter expression, the Commissioners of 1830 remarked that “the plan of the seminary is thus most extensive, embracing all the topics which then were included in a University curriculum, and wisely, and with an anticipation of what has afterwards so strikingly taken place, authorising the addition of new branches of science without

a breach of the tenure of the foundation." But what, with reference to an existing institution of a living state, is of still greater importance than either the expressions of its founder, or the interpretation put upon them by Royal Commissioners, is that in the general mind of the community of the present day not the slightest hesitation exists either as to what the constitution of our University is, or what it ought to be. By this ultimate tribunal it is held to be a *studium generale*, not in what Sir William Hamilton conceived to be the historical, but in the modern sense ;—and as such, its functions embrace the whole field of knowledge, widening out indefinitely as that field extends itself.

It is true that the University seeks *ultimate* ends to which mere knowledge is but a means. But these ends are not peculiar to it. The fulfilment of God's will, and the development of humanity in God's likeness, are the common, as they are the final objects of every legitimate human endeavour. However variously men may have defined the *summum bonum*, the τέλος, the ἀγαθόν, the end and object of life, there are few subjects as to which diversities of opinion have more frequently been resolvable into verbal differences—relating to which there has been more substantial agreement. Wisdom, virtue, happiness, God's kingdom, if not identical, are each but the others seen from a different point of view. Notwithstanding their most strenuous efforts to diverge, those who toiled upwards have always found that their roads must meet at last ; and it is wonderful how consistently the better part of our nature, guided by those Divine influences by which it was implanted, has kept the face of humanity heavenward.

The speciality of the University, then, as of each of the separate institutions of civilisation, consists, not in the final end which it seeks, but in the sphere which has been assigned to it, and in the means which it employs. Now the means of the University is knowledge in all its branches. Its instrument is thought. The University, so to speak, is the State in the attitude of meditation. The function of it, and of its ministers—the contribution which they offer towards the attainment of "the good"—consists in faithfully seeking and fearlessly teaching "the true." But the University has no executive behind it, like that with which the State in its magisterial capacity, and even the Church, is armed. It consequently enforces no rules of conduct, and imposes no forms of dogmatic belief. As it is, in many respects, the deepest and the highest, the University is, in like manner, the freest of all social institutions.

As a branch of the University, then, an academical faculty of law, though no longer directed to knowledge in its integrity, is still concerned with knowledge alone ; and it is this that is

generally recognised as distinguishing it from the profession of the law. The object of the profession of the law, of jurisprudence seen on its practical side, is not so much that the law be discovered and made known, as that it be applied and obeyed. It is for the purpose of vindicating, in special circumstances, laws, the binding nature of which in the abstract is already admitted, that positive laws are enacted by the legislature, measured out to separate individuals by the judge, and enforced by the executive. The function of an academic faculty of law and its professors is altogether different. They too, it is true, have to deal with positive laws. But to them a positive law is not a rule which it is their duty to apply or to enforce, but a phenomenon which it is their duty to observe and examine. With a view to such an examination, it is of course indispensable that the phenomenon should be carefully and accurately described; and this description involves that elaborate statement of the existing law, and of the historical stages through which it has passed in the course of its development, which too frequently constitutes, in the eyes of the professional student, the sole value of academical lectures. Now there is, in my opinion, no error more likely than this to bring discredit on legal instruction thus conveyed. The symmetry of a legal system as a whole, and the historical evolution of particular doctrines, will probably be better exhibited in the lecture-room than anywhere else; but I have no hesitation in telling those who come here with the sole object of storing their memories with the details of positive systems of law, whether national or international, that they may accomplish that object better elsewhere. For this purpose no lectures will ever be equal to the pages of the ordinary text-writers well conned over, the rubrics of the reports, the practice of writers' offices, and the courts of law. As a practical art the profession of the law must be learned practically, and in the Faculty of Law we have no practical training-schools corresponding to the chemical laboratories and the hospital-wards of the Medical Faculty. Their existence, in connection with the University, in any case, is defensible on grounds rather of practical convenience than of scientific necessity; and I do not think they are called for in the faculty of law. But, be this as it may, it is not in order that they may have it in readiness to retail to a client, or quote to a judge, that the professor of jurisprudence makes his students acquainted with positive law; it is in order that he may examine it along with them, that he may explain to them *why* it is law; and this not only with reference to the special circumstances in which it was enacted—or, in case of its being consuetudinary or judge-made, with reference to the customs and usages or the previous decisions on which it rests—but why it is so necessarily and absolutely, and

will continue to be so as long as human nature and external circumstances remain unchanged. Should it so chance that in place of a healthy twig which draws its sap from the common root, a particular law appears to the professor to be an excrescence that wastes the vigour of the tree of justice, the fact of its existence will still entitle it to his consideration; and he will very often illustrate the principles of his science not less advantageously by explaining the grounds which have led him to condemn it. The extent to which, in the latter case, he may suggest a practical remedy, will depend on the fertility of his own genius. No man is bound to be original, for originality is God's rarest gift. But, for a professor of jurisprudence not to distinguish between what does and what does not rest on principle—that is to say, on normal human nature—would be as flagrant a miscarriage as if a professor of physiology or pathology were to fail to distinguish between the effects produced by the diseased and the healthy action of a bodily organ.

These few observations, taken along with the explanation which I have given you of the functions of the University, may perhaps be sufficient to indicate the relation in which the Faculty of Law, as a branch of that institution, stands to the profession of the law. It is the relation in which a science stands to an art. The Faculty of Law in the University is the scientific side of the profession of the law, just as the Faculty of Medicine in the University is the scientific side of the medical profession. So far, I take it, there can be little difference of opinion. But does this explanation exhaust the functions or the spheres of the two academical faculties in question? Is the healing art coextensive with the Academical Faculty of Medicine, *as it is*? Is the profession of the law coextensive with an Academical Faculty of Law, *as it ought to be*?

Our Faculty of Law, as it now stands, is the nearest approach to a complete faculty of law of which this country can boast. We have six chairs, three of which are strictly, and three of which are partially, professional. The partially professional chairs are those of constitutional law and history, which I think we are entitled wholly to reclaim from the Faculty of Arts; medical jurisprudence and police, which we share with the Faculty of Medicine; and public law and the law of nature and nations. Lastly, there is the lectureship of political economy.

Now all these chairs and parts of chairs pertain to us, as it seems to me, precisely on the same principle on which the non-professional and partially professional chairs belong to the Faculty of Medicine;—on the principle, viz., *that our academical faculty, transcending the limits of the profession of the law, ought to be coextensive*

with one of the great subdivisions of that world-wide domain of science which it is the function of the University, as a whole, to people and replenish. That such was the view of the Commissioners is obvious, not only from the chairs which they constituted or revived, but from the very enlightened provisions which they made with reference to the examination for the new degree of Bachelor of Laws, expressly in order "that it should be considered as a mark of academical and not of professional distinction."¹ Nor is it the less clear, from the whole scope of the Report of the Faculty of Advocates, to which the Commissioners refer, that in adopting these measures they acted in strict accordance with the suggestions of that learned body.

It is true that, for the reasons at which I hinted in the outset, the limits of the wider academical field do not admit of being traced with so firm a line as that which marks those of the narrower professional one. But it does not seem to me that they are therefore less plainly indicated by what has been already accomplished in this and other Universities. The non-professional chairs which we ourselves possess, and still more those which are attached to the faculty of law in Universities in which that faculty is more fully developed, taken along with the character of the profession of the law, tell us unmistakably that *this academical faculty, as its ultimate sphere, must embrace the whole science of man, seen in relation to his fellow-men, and to the external world.*

As the highest manifestation of mere animal life, he falls to the share of the Faculty of Medicine; as an isolated spiritual existence, he forms the noblest study of the Faculty of Arts; in his relation to his Creator, it is the sublime function of the Faculty of Divinity to deal with him; but *as a social being, he is ours and ours alone.*

The "science of society" has not been fortunate in its professed cultivators, either popular or scientific. In the public mind its name—in itself both definite and significant—is associated with a chaos of facts and schemes and aspirations, old and new, wise and foolish, practical, impracticable, and impossible. Amongst philosophers, its character as a science, and the methods of investigation applicable to it, are subjects of keen discussion. Is it a "positive science"? Ought it to be prosecuted inductively or deductively? And, if deductively, does it belong to the abstract or to the concrete deductive sciences? These are but a few of the open questions which mark the unsettled condition of men's minds on a subject of which it has been said, most truly, that "it has, of all others, engaged the most general attention, and been a theme of interested and earnest discussion, almost from the beginning of recorded

¹ Report, p. 36.

time.”¹ Such, indeed, is the character of the social science as it exists at present, that in mentioning it within the walls of an ancient University, under any one of the half-dozen epithets by which it is known, I feel as if I were introducing some outside heresy. And yet, I should be neglecting my duty if I failed to tell you that the science regarding which all this bewilderment prevails is the proper subject of an academical faculty of law. The science of society is pre-eminently our science, its home is not in wandering associations, however numerous attended, but with us; and if the endless questions relating to it which have sprung up within the last thirty years have been erroneously or inadequately answered by those who, in the hurry and bustle of their special avocations, have bestowed on them but passing thoughts, the fault is mainly to be ascribed to the inefficient action of this organ of the body academical. In place of stepping forth from our retirement, and volunteering to aid society in the work of self-examination which it seemed willing to undertake, we have waited till it comes knocking at our doors, as if we believed that its laws might be discovered by talk and excitement, just as well as by study and meditation. Our only apology is that so small a band could scarcely, with prudence, have charged itself with so onerous a duty; and the apology is one of which I hope the wisdom of our fellow-citizens will ere long deprive us.

But though the condition in which we find the science of society, when contrasted with the various departments of physical and even of abstract mental science, be proof enough that it has not been cultivated with the care which it merits, I utterly deny to it the character either of a scientific or an academic novelty, and I further demur to the assumption that the methods by which it has been prosecuted in times past have been fundamentally erroneous. I believe that 1824 has been fixed on as the year of its birth, and I will not dispute that something like a regeneration has been effected by the attention which, from about that period, has been directed to it; but I cannot, even on Mr. Mill's high authority, assent to the proposition that it is “but of yesterday that the conception of a political or social science has existed anywhere but in the mind of here and there an insulated thinker, generally very ill-prepared for its realisation.”² I know not whether Aristotle belongs to the class of thinkers thus characterised; but I cannot forget that in proclaiming a doctrine well-nigh new to this generation, and for which, if he had been wise enough and bold enough to adhere to it as a practical legislator, future generations would have blessed his memory, Mr. Mill was anticipated by Aristotle. The doctrine to which I refer is that relative or

¹ Mill's *Logic*, vol. ii. p. 457.

² *Ib.*, p. 456.

proportional, as opposed to absolute, equality, as the true conception of the *de facto* principle, forms the true basis of political organisation both national and international. Then, as regards the question of method, I believe that a perfect scientific method, like a perfect scientific definition, must be worked out gradually and tentatively. But take the very doctrine in question, and I think you will find that Mr. Mill arrived at it by precisely the same train of reasoning which had led Aristotle to its adoption more than two thousand years before. Fixing their attention on the unchangeable characteristics of human nature rather than on the shifting phenomena of society, both philosophers maintained that, however the latter might be disposed of, the former must be constantly recognised, and that their non-recognition could result in nothing short of the disorganisation and ultimate dissolution of the body politic. But I must resist all further temptations to digress, and hasten to the few practical suggestions which I desire to offer, as to the means by which the Faculty of Law may be made commensurate with the sphere of labour which we have assigned to it as a branch of the University, and which the requirements of the age so urgently demand that it should undertake.

These suggestions divide themselves into two classes: 1st, The subdivision of subjects already recognised; and, 2d, the recognition of subjects hitherto ignored.

Under the first head—carrying out the view which led the Commissioners to institute a summer course of lectures on Criminal Law, I would suggest a separate chair for the cultivation of that subject, including under it, as new matter, the whole of the subject with which you have recently become familiar under the title of "Punishment and Reformation."

My own department falls into two distinct sections: (i) Natural Law, or General Jurisprudence, which is general in its character, and forms the basis of political economy, just as much as of conveyancing; (ii) the Law of Nations: Public and Private International Law. The two subjects of Public and Private International Law should also be separated, either by assigning two chairs to them, or by requiring the delivery of two distinct courses of lectures. By this means the chair, or at any rate the course, devoted to the law of nature and nations would be placed on its original footing, and a very important department of private law far more adequately provided for than it can be when conjoined with two such formidable subjects as the principles of general jurisprudence and the law of nations.

Under the second category would fall history—which, in my opinion, ought to be taught in relation, not to the development of constitutional government alone, but to political and social life

generally, different epochs being dealt with in separate courses, if not by separate professors. The failure of an unendowed chair of history in the Faculty of Arts affords, as it seems to me, no indication whatever of what might or might not be effected were that great subject taken up, as it ought to be, in conjunction with the other branches of study pursued in the faculty which deals with social life as its specialty.

Political economy ought, and I have no doubt will at no distant period, form the subject of a separate chair,¹ or at any rate claim a separate endowment, in connection with the Faculty of Law.

There are many other subjects bearing on social life which, though less obviously calling for separate treatment, can scarcely, I think, with safety be left much longer to the chance investigations of mere volunteers in reviews and newspapers. As an example I may mention colonisation, or the doctrine of the formation of new communities in advanced stages of civilisation—a subject of vast and growing interest, relating to which, it is to be feared, some serious and perhaps irretrievable errors have been committed, from which a more accurate acquaintance with the records of former experience might have saved us.

These hints I throw out rather as indicating the direction which development must take, than as assigning its measure and its limits, or insisting on the imperfections I have pointed out as those most urgently demanding immediate attention. There is one misconception, however, with reference to this and all the other proposals for the development of our University system of which I have been the originator, against which former experience warns me that I must positively guard. I refer to the notion that, in proposing to subdivide subjects, or to introduce new ones, I intend that students should be burdened with additional courses of lectures, or with more extended examinations. I read in the newspapers, with the greatest gratification, the very able lecture, in which my colleague, Professor Syme, pointed out the evils resulting from the extent to which attendance on lectures and examinations has already been carried in the Faculty of Medicine. I agreed, not of course from a medical but a general point of view, with every syllable that was said, both by the lecturer and by Professor Christison and others, on that occasion; but I did not require to be converted by their experience or their arguments, for on the subject of examination, and even of class attendance, if carried beyond very moderate limits, I had always

¹ A chair of Commercial and Political Economy and Mercantile Law was instituted by the Edinburgh Merchant Company in 1871. By a resolution of the Senatus Academicus in 1879 it was declared to be a chair in the Faculties both of Arts and Law.

been a heretic. Holding these views, why, you will say, propose to increase both the number of the subjects taught, and the teaching staff of the University, and more particularly of the Faculty of Law? My answer is, that I am desirous of seeing a much larger portion of the community than is now the case educated in the Universities, not in the preliminary Faculty of Arts alone, but in the professional faculties; and that this can be accomplished only by affording to students an opportunity of specialising their studies in many different directions. If the University embraces the whole field of science, it ought to teach the whole community, in so far as the community is occupied with subjects that admit of scientific teaching. Again, if the Faculty of Law embraces the whole field of social science, it ought to teach all those who are occupied with social subjects. But it is by no means desirable that lawyers should be multiplied; and, as regards the highest branch of the profession, it would seem as if they were already too numerous. So far, however, from the multiplication of lawyers being the necessary or even the natural consequence of such a development of the Faculty of Law as I contemplate, I believe that, by opening new careers, and by widening out the legal into a social profession, it would act in the opposite direction. The Faculty of Medicine has long directed the attention of its pupils to the studies, not of the physician and the surgeon alone, but of the chemist, the botanist, the zoologist, the geologist, the mineralogist. In like manner the Faculty of Law, if it is to fulfil its function, must become the training-school, not of lawyers alone and judges, but of statesmen, legislators, and all civil functionaries down to the point at which their occupations become mechanical; of diplomatists of every denomination, of consuls, governors and deputy-governors of provinces, of colonial secretaries, and colonial legislators in self-governing colonies,—in a single word, of what, by a latitude of expression not so great as it may seem, I may call the civil hierarchy, domestic, foreign, and colonial. Nor do its duties stop even here. Those who, on behalf of the public, undertake the arduous, and, when rightly appreciated, the highly responsible duty of watching and criticising the actions of our public men, ought, if possible, to be on a level with them as regards their original training. The higher class of political journalists and review-writers, the men who in France have arrogated to themselves the name of publicists, deal in the directest manner with the science of society, and are thus as fairly within the scope of the Faculty of Law as any branch of the official civil service. Their training need not be of so accurate and definite a kind; but, inasmuch as their activity ranges over a wider field, it ought to be even more extensive; and it would plainly be just as absurd to impose

on the non-professional persons, whose training thus belongs to the Faculty of Law, attendance on the strictly professional classes of Scots Law and Conveyancing,¹ as it would be to extend the studies of Scottish law-students to all the subjects which we propose to introduce into the Faculty of Law.

I by no means shut my eyes to the fact that one of the results of this arrangement would probably be that several of the classes would be very small ones; but I am so far from regarding this as a disadvantage that I believe small classes, in all the more special branches of instruction, to be inseparable both from efficient teaching and from diligent learning. Few men are strong in more than one specialty, and if the teacher ranges over several, it is only a portion of his course which, in general, will be fresh and vigorous. As regards students, on the other hand, the numbers who apply themselves to each special subject being necessarily limited, if the attendance on a class where special subjects are taught be numerous, a portion of the students will always be but slightly interested in the instructions addressed to them. But small classes, of course, imply large or at least numerous endowments; and here we arrive, at last, at what is always the crowning difficulty of every scheme of University improvement. Granting, they will say, the desirableness of the Faculty of Law being developed in the manner you have described—assuming that such a development would afford the most valuable of all guarantees for social progress, the surest of all safeguards against social miscarriage, reverse, and retrogression—the absence of endowments renders it impossible as matters stand, and the difficulty of procuring them renders it ultimately impracticable. You may think me a visionary if you choose, but I confess to you that I do not share this feeling of despondency. I think better of Scotchmen, and more especially of the noble profession to which it is my pride and happiness to belong, than to believe that anything will ultimately seem impracticable to them which is not impossible, and which they admit to be called for by the highest interests of their country. That the thing may be accomplished is too obvious to demand either argument or illustration. A single regiment of infantry, a single ship of war, costs more in a twelvemonth than would be requisite to place the Faculty of Law on a footing commensurate with the duties which its place in the University and its relation to the community assign to it.

In the profession of the law, admirably organised and efficient as it is in this country, we already behold the realisation of a portion of the aspirations which it is the duty of the academical Faculty

¹ The other more or less professional class is the Roman Civil Law, which, I think, all candidates for the degree of Bachelor of Laws ought to attend.

of Law to cherish. It is to the support and encouragement of this body, in the first instance, that we must look for the means which are requisite for the discharge of our own full duties as a faculty. Hitherto, inverting their natural relation to each other, the profession of the law has actually been wider in its range than the academical faculty. The Bar of Scotland, for ages, has supplied, not our advocates and judges only, but to a very considerable extent our higher civilians of every class. Long may it be so! I am not of the number of those who believe that any mystical virtue is communicated by the laying on of hands, either in this or in any other profession. But I am a firm believer in the benefits which the training, and I will add the traditions, of our profession confer; and when I hear that any important appointment has been intrusted to one of its members, I feel a relief similar to that which I should experience if I heard that an officer in the Navy was in command of a vessel in which I was sailing, or that a regiment of volunteers that had been called to active duty was led by an officer of the line. It is for the purpose of affording to my professional brethren, in future times, the means of qualifying themselves more fully for the discharge of those active duties of citizenship which will fall to them in so many forms, quite as much as with a view to the interests either of the community or of this University, that I have ventured to offer to you these suggestions for the development of the academical Faculty of Law.

II.

PROFESSOR AYTOUN.¹

Introductory Lecture delivered to the CLASS OF PUBLIC

LAW, 2nd November 1865.

SIX months can never pass in this changing world without presenting to us who assemble here new subjects of contemplation, and shedding clearer light, or sometimes, it may be, darker shadow, over the path which it is our duty to tread. The propositions of Euclid possessed the same significance in April that they possess in November. The laws of thought have not altered, nor have external events affected the science of which they are the object, though the studies of my learned colleague and his disciples may very possibly have done so. The pages of the great historians and speculative politicians of antiquity, no doubt, annually invite their students to a fresh harvest of instruction. But the structure of the languages in which they wrote is the same; whilst that wide field of literature which in all time has been devoted to man's human relations, to his loves, his hatreds, and his hopes, has substantially the same lessons to teach to all generations. The odes of Horace and the choruses of Aristophanes are to us very much what they were to our great-grandfathers.

But there is no department of *our* studies which is sheltered from the influence of passing events. *Tempora mutantur nos et mutamur in illis* is specially true of the Professor of Public Law and his pupils. Even the first branch of the course, which is devoted to the science of jurisprudence in the abstract, is by no means an exception; for historical experience, or the observation of what is vulgarly called "utility," though not the only channel, is, unquestionably, a very important channel, through which the law of nature is revealed to us. The great problem, what rules are absolute and permanent, and what relative and transitory, what

¹ William Edmondstoune Aytoun, D.C.L., author of *Lays of the Scottish Cavaliers*, etc., etc., Professor of Rhetoric and English Literature in the University of Edinburgh, 1845-65.

are those which rest on the immutable characteristics of our common humanity, or spring from the accidents of time and place, may receive elucidation in many directions from the issue of a war, or even of an election, and I trust I shall be able to show you, by-and-by, that it is not in suggesting new rules of positive law alone, or new interpretations of those with which we are familiar, but in confirming in some cases, and modifying in others, our conceptions of principles which in themselves are eternal and immutable, that the teaching of events during the last six months has been instructive.

But though it is to the great world without that our eyes as students of Public Law will direct themselves, and there to events rather than to men, it is not there alone that time has left its traces. In our own narrower academic world there have been memorable and mournful occurrences which cannot fail to be present to our minds to-day, and there is one above all which forces itself on my recollection and saddens my heart. Aytoun is gone! In him you have lost a zealous, successful, and most attractive instructor; and I have lost an old friend and companion, the charms of whose intimacy and value of whose character I had fully appreciated only since the accidental arrangements of our respective classes brought us much together. He was so full of spirit when I saw him last, that, though his health was not all that could be desired, he belonged entirely to the ranks of the combatants; and I can scarcely think even yet that his activity is ended, and that the voice we knew so well is silent for ever. When I came into the retiring-room just now I could scarcely banish a lingering hope that he would be there after all, and that I should receive the hearty greeting on the commencement of a new session, and the gay account of his autumn doings which I knew he would have given me. But it is not his students and his colleagues and his old professional brethren of the Parliament House, the associates of many a weary session and of many a merry circuit, who alone will join with those nearer and dearer than any of us in mourning the loss of one whose happy privilege it was to be admired without ceasing to be beloved. Wherever the English tongue is spoken or read, men heard with unfeigned grief of the early death of a poet who had charmed them, of a wit who had amused them, and of a satirist who had reproved their faults without wounding their sensibilities. On Professor Aytoun's merits in these respects I have no special warrant for expatiating. They were as perceptible to those at a distance as to those who were near him, and many who never saw him can judge of them better than I. Nor shall I speak of his success as a University teacher, for to that theme some of his colleagues in the Faculty

of Arts have already done justice, whilst the well-known fact of the great numbers who flocked to hear him is itself a sufficient testimony to his popularity. But there were some personal characteristics which distinguished him from the generality of men, not unremarked by the public, I dare say, but better known and more fully understood by his acquaintances, of which it seems not unbecoming that we should make mention to-day; and there is one in particular of which I shall constitute myself the historian, because, odd though it may seem, it bears in my opinion very directly on the business of this class.

Professor Aytoun, to an extent somewhat unusual amongst men of strongly marked individual qualities in the present day, was a gentleman, not only in the absolute but in the conventional sense. A common friend, who had been introduced to him for the first time, once described him to me, happily I thought, as "one whose manners exhibited the positive politeness of old Scotland, as opposed to the negative politeness of modern England." Mr. Aytoun did not conceive that the part of a gentleman was played simply by looking self-possessed and saying nothing out of joint. If a man was to claim that character and maintain it, his view of the matter was that he must say the happiest and pleasantest things he could think of, that he must scatter flowers before his neighbour, and shed sunshine on his path whilst all was fair, and that even in foul weather (for he was too much a man of the world not to know that "offences must come") he must contrive to hold his own with the smallest possible amount of what I may call social bloodshed. I believe we should be surprised if we could calculate how much of the happiness and success of our friend's really happy and successful life was owing to the observance of this simple and obvious rule; and I fear it would surprise us less agreeably, if we could discover how much of the unhappiness and ill-success of the lives of many of us is owing to its neglect. Scrupulously courteous and considerate in his own intercourse with mankind, nothing in others was so offensive to him as rudeness. Rusticity and *gaucherie*, if explained by the antecedents of the individual, and not too flagrantly at variance with his position, he would do his best to endure. But if any man forgot his position, whether that position was acquired or inherited, whether it was above his own position or below it, his endurance was at an end. Other faults of conduct he viewed like other honest men,—but faults of this class,—impudence, insolence, want of self-respect and respect for others, were faults which subtended, so to speak, a larger angle of moral vision with him than with other people. It was not so much that disorderly conduct of this kind displeased him and made him angry, as that it disgusted him; it seemed to offend his

very bodily organs, and far from reciprocating it, or responding to it in mind, he fled from it or thrust it from him as if it had been an outrage on his person. The feelings I have described, as the feelings of all of us do, modified Professor Aytoun's opinions, both social and political; and they even account, if I mistake not, for some important occurrences of his personal history. Once aware of their strength, so far from wondering that he became a Conservative, or doubting the reality or distrusting the motives of his conversion, I always felt that it would have been impossible for him throughout life to have avoided going in the direction in which his sympathies from the first must have impelled him so decidedly. From his abhorrence for rudeness and all that was disorderly and anarchic in social intercourse, it naturally followed that he attached a very high value to social organisation, to the existence, I mean, of the various classes into which society is arranged in old historical countries, and to the traditional rules by which these distinctions are maintained. It is possible that, to some extent, this feeling may have been strengthened by the accident of birth, for, though he owed his fortunes entirely to his own exertions as a lawyer and a man of letters, he was descended from an old family of country gentlefolks. But it had its root, I am sure, in the first cause I have mentioned, viz. in the protection which a well-marked distinction of classes affords against the attempt of each man to take the laws of society into his own hands, which speedily ends in the disregard of such laws altogether. Though he was far from making light of the advantages of hereditary cultivation and refinement as claims to the respect of others, he valued them much more for what they enabled their possessor to confer on society than for anything they could possibly entitle him to exact from it. *Noblesse oblige* he understood, as it should always be understood, as indicating duties, not rights; and it was only on the footing that it is more blessed to give than to receive, that the position of the noble who could give more was a more enviable one socially than that of the peasant who could give less. And amongst the gifts which it was at once the privilege and the duty of the higher classes to confer, the very foremost was that social order which was the only security, not for their pre-eminence only, but for every decent man's place in the world. Now the watchword of conservatism, as Professor Aytoun understood it, and as all sensible men understand it, its distinctive badge, and symbol, was *order*:—not social exclusiveness, not political finality, but order, social and political; organic existence in the State, as opposed to that inorganic, anarchic, chaotic scramble for existence in which everybody would be uppermost, and where there is no King in Israel, towards which he thought, or felt, that the other political

parties were drifting. Just as liberty is the guiding star of one class of minds, order is that which attracts another, necessarily and inevitably; and Professor Aytoun's mind was of the latter class. Born amidst Whig traditions, his congenital instincts were Conservative, and his instincts finally prevailed over his traditions.

It is true that order without liberty is just as vain an aspiration as liberty without order. Either, viewed as a single object, is at once undesirable and unattainable; for the two objects are inseparable, and both are but means to greater and higher ends. Had Mr. Aytoun's political insight been deeper, he would have seen that the party which he joined had seized one half of the truth which his old friends had forgotten, only to lose hold of the other half of it which his old friends remembered, and that he was no nearer to a rational creed than before. But he was not a speculative politician;—he did not reason out a creed for himself, he felt out, amongst the creeds that existed, that which suited him best, and the Conservative symbol was that which appealed to his sentiments.

I have said that social organisation does not imply exclusiveness, and that political organisation does not imply finality. These are the kindred errors, it is true, that grow out of a one-sided recognition of order, whether regarded in its social or its political application, but they are not involved in the idea of order, or inseparable from it; they do not form part of any genuine healthy English conception of it. And it is in holding firmly to this idea, and yet keeping it carefully apart from these errors, that the opinions of such men as Professor Aytoun become instructive to us as students of public law, and specially with reference to what is going on around us in the world at the present time.

The compatibility of order with liberty, or rather the inseparable character of the relation in which they stand to each other, notwithstanding the difficulty, perhaps I ought to say the impossibility, of establishing a perfect equilibrium between them, is a subject which will claim our attention hereafter in a more formal and abstract manner. But even at present, I believe I can scarcely employ this introductory hour in a more instructive manner than by illustrating this relation to you popularly, and by calling your attention to the fact that some of the happiest characteristics of our own condition, both social and political, are directly traceable to its recognition, whilst its denial explains in no small measure the misfortunes of two great nations, in whose prosperity and happiness no Englishman can ever cease to be interested—I mean America and Prussia. In the first place, as regards society—I maintain that a well-defined distinction of classes, so far from being

prejudicial to freedom of intercourse between their members, is an *aid* to such intercourse; and I believe the society of this country, as contrasted with that of America, to be an illustration in point. In this country, compared with America, classes are sharply marked, and the transition from one to another, though the path be open, is probably more difficult. But though we read about *exclusiveness* in novels, and though foreigners, who talk of England as an aristocratic country, assume that there must be a vast deal of exclusiveness in English society, I really do not think that it is intentionally practised by any class whatever (I say nothing, of course, of individual follies and absurdities), from the very highest level to the very lowest at which any guarantee for personal cultivation and refinement is to be found. To begin at the top. We have only to look into the newspapers to convince ourselves that the family and official circle that gathers round the Royal board opens itself almost daily, by the command of our Gracious Sovereign herself, to receive every one who has the slightest claim on her hospitality. Professional men of all classes—clerical, lay, and military, artists, men of letters, engineers, explorers, inventors, mingle with noblemen and Princes of the Blood, and enjoy each other's society quite as much as if they were equals, and far more than if they pretended to be so. It is the fact that each man's position is marked out for him, and that no man does or can claim any other character than his own, that alone renders such a promiscuous gathering possible. If it were otherwise every man would distrust his neighbour, and every dinner-party at Balmoral would be a little revolution. It is the same with the house and the table of every lesser magnate. The numbers and variety of a nobleman's guests will be proportioned to the extent and variety of his interests and avocations. If he is a politician, taking a large share in public affairs, they will be numerous and promiscuous. If he is a quiet country-gentleman, dwelling amongst his own people, they will be few and select. But even where the sympathies of the individual are more restricted, it will be a mere personal accident, if on the part of a nobleman there is any greater intention of shutting his doors against any one who has the slightest claim to enter them, than might be alleged against every man of letters who is a recluse, or professional man who is busy, or clergyman who is poor. That many social circles are widened for a purpose I have no difficulty in believing; but that any of them are narrowed for a purpose, or that any gentleman is excluded from the society of any other gentleman from motives of class alone, in this country, is, I hope and believe, a very rare occurrence, and the footing on which visits are reciprocated is, as a rule, equally sound. Provided there is a good reason for it, a

reason which appeals to the common-sense and good feeling of two rational human beings, no man need hesitate to proffer his hospitality to any other man, however elevated may be his rank. If he is quite sure that their meeting will contribute to the honest personal enjoyment of both parties, he will, in general, be quite safe to act on his own gregarious instincts. But if there is no other reason but the vanity of entertaining a grandee, then that is not a good reason, and had better not be acted on. But in America, if we may credit the testimony of trustworthy witnesses, from M. de Tocqueville down to the most recent newspaper correspondents, all this is very different. In that country there is scarcely any acknowledged distinction of classes at all, and there is a great deal of exclusiveness. The evils which men attempted to avoid by pulling down the landmarks and obliterating the traditionary classification of European society have come upon them with tenfold intensity in consequence of that very attempt. The advantages of wealth over poverty, of inherited wealth over acquired wealth, exist just as with us; the distinctions of individuals, and families, and classes are as real as ever, the only difference being that because they are not acknowledged, they make themselves felt in a manner fifty times more offensive—viz. by every man who is able enforcing their acknowledgment in his own behalf, and in accordance with his own caprices, and as a necessary consequence interfering with the caprices of his neighbour to an infinitely greater extent than the strictest rules of social intercourse would have interfered with them.

But what do you make of Prussia? you will ask me. *There* is a country where the distinction of classes is surely sharp enough, and yet there is no liberty, either social or political. Now I think I can explain the contradiction which Prussia no doubt apparently presents to the rule I have stated, without resting very much on the anomalous political position in which she is placed in consequence of the want of any proper limitation of the monarchical element in her constitution. Prussia's "glorious revolution" is yet to come, and consequently her history must be compared with ours previous to 1688, not now. But that is not the sole reason of her present unfortunate position. The recognised classification of society in Prussia is not a true classification—that is to say, it is not a classification that rests on the facts of the case. Let me illustrate to you what I mean. With us the class whom we recognise as nobles are really the tallest poppies. They are the leaders of society; and they would be so, whether they constituted a titular nobility or not—though in the latter case they might exhibit a little more of the American spirit, and not be quite such pleasant leaders as, on the whole, we find them. But in Prussia

this is different. Of those whom the framework of society recognises as noble a very large number are not in the position of noblemen at all. The nobility of these persons is a mere system of names; but they are names to which they themselves naturally attach importance, and to which they seek to give a *quasi*-reality by resorting to the very same expedient which the want of such names has forced on those who in America are not wholly destitute of the reality, viz. exclusiveness. A Prussian noble is exclusive because he is recognised as what he is not. An American magnate is exclusive because he is not recognised as what he is. An English nobleman has no occasion to be exclusive, because his rank corresponds to his character—he is recognised as what he is.

I wish I could say that our political system deserved the imitation of the nations I have mentioned as unreservedly as our social system appears to me to do. Before another decade passes over us I hope the one may be so adjusted to the other as that the legislature may be indeed the mirror of the nation. But even as matters stand, our liberties are the obvious result of such political organisation as we possess, not of its absence. The political limits of the monarchical element are fixed, the political functions of the nobility are assigned to them, both in perfect accordance with the *facts* which society has recognised. The want of classification of the commons, with a view to their organic representation, is the constitutional defect which still cleaves to us, by the removal of which alone full scope can be given to all the resources which the community places at the disposal of the legislature. How this classification is to be effected is the great problem of the day, which is gradually working itself into clearer light. On the answer which may be given to this problem, for very obvious reasons, I shall not venture to speculate here; but this I shall say without any hesitation, that the more complete the answer is, the sounder, truer, and more exhaustive the classification which may be ultimately adopted, the more perfect and the more stable will be the liberties of this country; for order is the safeguard of liberty, and the more complete the one the more perfect will be the other.

III.

THE GERMAN WAR.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
5th November 1866.

SINCE I last had the privilege of addressing the Public Law class, very great and wonderful public events have occurred. A page has been added to the political history of Europe, the reading, interpretation, and appreciation of which will not only tax our ingenuity, but will occupy the attention and probably divide the opinions of political speculators as long as European civilisation shall be a subject of comment.

It is not needful that I should narrate to you, in any detail, events which are still so fresh in the memories of us all. The hard-working, anxious, restless, and progressive North has once more prevailed over the indolent, easy, and retrograde South; the lesser of the two Empire States of Germany has swallowed up several of the minor subdivisions of the land, and become more than the equal of its hereditary rival; the great Central European Confederation has been dissolved, and though two Confederations, for the present, have taken its place, both bear the marks of a provisional character; and there can be little doubt that a long stride has actually been made towards the realisation of that national unity which, for many years, has been the aspiration of all patriotic Germans. An eddy of this mighty current of national reorganisation in Germany has carried the ancient Republic of Venice, by what we may regard almost as a fortunate accident, safely into the haven of Italian nationality and freedom. All these wonderful achievements have been performed by a nation whom, in our insular self-sufficiency, we were wont to reproach as transcendental dreamers; they have been the reward not so much of the physical courage and energy of which that nation assuredly has exhibited no lack, as of patient study and forethought; and they will furnish, I trust, a final answer to the vulgar notion so prevalent in this country, that theoretical eminence is inimical to practical success. Such is the bright side of the picture.

But these results have been purchased at the expense of an exceptionally bloody though brief campaign, fought between those whom kindred and country bound together by the dearest ties ; and they have been accompanied by violations of the public law of Europe,—inevitably, perhaps, as that law stood, perpetrated, it may be, equally by the vanquished and the victors,—but deeply to be deplored as occurring on the part of a people whose prominent place in the civilised world imposed on them the duty of guarding that law with no common care.

The technical question as to the construction of a particular section of the Federal Act, which Prussia raised after both parties were armed for the strife, was a mere signal for battle. On some future occasion I may possibly recur to it ; but, for the present, it is enough for us to know, that long before that question arose both parties had abandoned themselves to influences far too powerful to be controlled by any interpretation of a law which no third party was in a condition to enforce. The merits of the decision which was arrived at by the Diet, supposing them to be doubtful, have, consequently, little interest beyond the circle of German jurists.

As regards those deeper motive powers which have been at work in this great political upheaval, I cannot aspire to do more than commence the task of determining their character. Far back into the past, before the Peace of Westphalia, or even the Reformation, their historical roots may be traced ; and during the last two hundred years scarcely an event has occurred which has not visibly contributed to augment them. I cannot, therefore, hope to tell you, with any completeness, what they were. But to a certain extent I think I may tell you what they were not ; and there are two theories with regard to them which, if I am not mistaken, we may dismiss with some confidence at the outset.

By many persons, both in this country and abroad, it is believed that there are just two tendencies that govern political life in general, and the political life of continental Europe more particularly—the democratic tendency, popularly known as the revolution, the object of which is to establish the absolute dominion of the numerical majority and gradually to level all distinctions, social, political, and even material,—and the monarchical or dynastic tendency known as legitimacy, which seeks to uphold the rights of sovereigns as inalienable, the social fabric as unchangeable, to separate classes by impassable barriers, and, in a word, to stereotype society on its present basis, or, if possible, to revert to the basis which it occupied previous to the destruction of exclusive privileges, in France and elsewhere, towards the close of last century. The Red Republic and the Holy Alliance are names, it is true, which have lost many of their terrors for orthodox believers

in liberty and order ; but the tendencies of which they were the symbols fifty years ago are still represented in almost all European countries by two distinct political parties ; and I am told that the phenomena we have recently beheld in Germany are claimed as triumphs by each of them. By the one the victory of Prussia over Austria, and the downfall of several of the lesser German thrones, is regarded as a realisation of the famous decree of the National Convention of 1792, and the true mission of the Prussian arms is supposed to have been "to afford succour to citizens vexed for the sake of liberty ;" by the other party the very same facts are viewed as a gratification of dynastic ambition and a realisation of the despotic aspirations of 1816. Now, if I believed either of these representations to be correct, I should not regard the occurrences which they seek to explain as steps in the direction of national organisation, or of political freedom, or, indeed, as genuine movements in advance in any direction whatever. The doctrines of equality and finality are both, and both equally, elements of error with which human envy, selfishness, and stupidity poison the fair stream of progress. They assume many guises, and each takes refuge from its own nakedness in the other's rags. Absolutism passes into Cæsarism, and affects to rest on universal suffrage ; whilst democracy veils itself for a while under monarchical traditions which have become mere antiquated formalities, and under constitutional checks from which all reality has departed. But it matters little what masks they wear, or by what new names we call them. Their substance and their effects are unchanged, and the best that can be said for them is, that that under which men smart for the time being is almost always welcome to them as a protection against the other which they have recently endured. Moreover, the turning-point is always a period of hope. Through the turmoil which accompanies it a transient vision of higher possibilities appears ; it may be that the old errors will not be repeated ; and great as is the injury which revolutions have inflicted on the cause of civilisation, it is, at any rate, some consolation to feel assured by their recurrence that the permanent triumph of either of these fatal tendencies is impossible.

At first sight the abstract principles which these tendencies embody present themselves to the mind almost like irreconcilable contradictions, each of which must exclude the other, and one of which sooner or later must practically prevail. But in truth they are only extremes, which, like other extremes, meet, and whilst they mutually engender, mutually neutralise each other. Despotism sows the seeds of insubordination, which democracy ripens into anarchy, and anarchy is the chaff on which the flame of despotism feeds, and in the consumption of which its energies are exhausted.

It is this dreary process that constitutes the cycle which philosophers have so often described, which history has so often exhibited, and in the accomplishment of which those God-given powers, that seemed destined to carry us forward and upward, will continue to be wasted till men learn the lesson of recognising each other's rights at their actual value, in place of pushing their own to the point at which they become self-destructive. When this lesson shall be learned practically it is impossible to predict, for it is a lesson addressed to men's hearts as well as to their heads, and the former are more impervious than even the latter. But that it should not be theoretically learned; that a proposition so simple as that all rights being equally sacred does not imply that they are equally great, that all men being equally men does not imply that they are equal men, should not be apprehended intellectually, is positively inconceivable. And yet that it is not generally so apprehended with any clearness or consistency, either in this country or in any other, no one can fail to convince himself who looks into the political literature of the day, or who reads or listens to a debate in any popular assembly.

Indications of these mistaken tendencies are, as I have said, rarely absent from political movements on the Continent. What we hear of the relations between the King of Prussia and his Chambers on the one hand, and of plebiscites and parliaments on the other, proves but too plainly that this German revolution has been no exception. But it does not appear to me that they have been present in any peculiar force on that occasion, or that their action furnishes in any degree the true account of what has taken place in Germany. In the main, I think we may accept it in its ostensible and acknowledged character, and thus put aside the suspicion of present insincerity, and the apprehension of ultimate futility which the adoption either of the dynastic or the democratic hypothesis would warrant. Let us view it then as a manful and vigorous if not a very scrupulous effort, by the more energetic and progressive portion of a great people, broken up by historical accidents, but united by their deeper sympathies and antipathies, their interests and their aspirations, one in blood and one in speech, to assert for themselves by political union that place in the counsels of civilised mankind of which their internal divisions alone have deprived them. When so regarded, this German war—no longer the result of mistaken longings or internal jealousies—brings anew into the light of present activity those generative principles which have governed the formation and development of all the greater States of Europe, and becomes in many directions a most instructive subject of meditation for students of Public Law.

.. In the *first* place, and very obviously, it illustrates the im-

portance of the ethnological element—of what is called “the principle of nationality”—in the formation of political societies; and it illustrates it in two ways. It bears on the face of it, as one at least of its chief causes, the desire to vindicate for the great Teutonic family of nations, apart from all admixture, “a local habitation and a name;” and it teaches us, by a signal example, that even where other matters are not equal, the fortune of war is likely to favour the combatant whose forces are homogeneous.

In the *second* place, coming as it does immediately on the heels of the American war, it exhibits in a very striking manner the action of those forces which, in opposition to the admirers of Confederations, I am in the habit of pointing out as continually at work for their disintegration—the centrifugal, namely, and the centripetal forces. A balance of these forces is the condition, *sine qua non*, of federal life and well-being. But the preservation of such a balance, even when guarded with every conceivable expedient, has hitherto proved to be a practical impossibility. Either the one element or the other inevitably gains the ascendancy, and the Confederation proceeds either to resolve itself into several distinct communities, or to amalgamate into a single State. If the elements which compose it are heterogeneous, the former tendency will prevail; if they are homogeneous, the latter; but in neither case will the Confederation prove a stable political organism. The best chance of its permanence,—as, indeed, I think it is the only case in which its permanence is to be desired,—is where the dissimilarities of race, religion, and language render amalgamation hopeless, but where the similarity of external circumstances is very great, and the community of interests very apparent. Switzerland is the oldest Confederation in the world; and if the federal bond be not drawn too tight—of which there have been many threatenings—there is every reason to believe that it may remain unbroken for ages.

Thirdly, the violent explosion by which, after years of dissatisfaction and fruitless debate, the Germanic Confederation has at last been torn asunder, and the labours of Münster and Vienna scattered to the winds, affords a very striking illustration of another principle on which I am accustomed to insist, viz. that unless positive law be brought into conformity with new facts, the facts will rend it, as new wine bursts old bottles. In national law this continual adaptation is the principal function of the Legislature; but international law, or the public law which governs a confederation of States, practically if not theoretically independent of each other, possesses no adequate legislative machinery at all, and this circumstance constitutes the *casus belli* to which pretty nearly all others that are not simple acts of robbery

may be reduced. Let us pause on this consideration for a moment; and in order that you may seize it free from any of those specialties which in the present case arise out of the constitution of the Bund, I shall speak of it in its bearings on the relations of States which are entirely independent. In almost all the publicists you will find a maxim to the effect that "treaties are extinguished by war;" and apart altogether from the material disasters which it engenders, it is scarcely possible to imagine a maxim which is more demoralising. War can always be proclaimed, and always proclaimed with impunity, by the stronger party; and such a doctrine, consequently, is neither more nor less than a scientific proclamation of the law of force. It strikes at the root of positive law altogether; for law between free communities, as between free men, necessarily assumes the form of contract, and a contract which either party may annul by simply violating it is no contract at all. But is not this unhappy position of affairs inevitable? So long as States remain separate, sovereign, and independent, for them there are no earthly "powers that be," and power, external to its subjects, is implied in the very idea of positive law. Is not a positive law of nations, then, a chimera, or at best a form of speech of which the real must always fall far short of the ostensible signification? These questions have received various theoretical answers; but it is needless to conceal from ourselves that they embody what has all along been, and continues to be, the practical stumbling-block of international jurists.

The statement of this difficulty brings us back to the doctrine of the balance of power; and the federative system of Europe supposed to have been constituted by the treaties of Westphalia, Utrecht, and Vienna. The solution which was sought for it in these memorable transactions was not only a very indefinite, but a very imperfect one; for what was aimed at in each case was an arrangement which should obviate the necessity of all future change, whereas what was really wanted was an organisation which should take cognisance of such changes as might be brought about by the progress or decadence of individual states and the continual transformations of opinion. But notwithstanding the objections which I have stated to those narrower confederations which tie communities together without uniting them, the old scheme of a federal Europe indicated, if I mistake not, the direction in which the answer must still be sought. It recognised the great facts, that whilst, on the one hand, the object of legislation is to protect separate and independent life, and to vindicate unfettered activity, however feeble,—on the other hand, absolute isolation and indifference to each other's actions and each other's

interests is inconsistent with that mutual dependence which God has established amongst the children of Adam,—that, if we are to be free at all, we can be free only by each other's aid; and it was a practical repudiation of the negative system of jurisprudence which long prevailed in the Schools, and the grounds for the theoretical abandonment of which, in our own day, I shall explain to you in the general portion of the course.

It is true that the doctrine of the responsibility of all the States which are admitted into the European system for the international conduct of each of them is a doctrine of difficult, and perhaps impossible, application in any of the forms which it has yet assumed. But I am persuaded that, just as within the State it is through a more perfect order—a fairer and ampler recognition of actual rights and existing relations—that the path to individual freedom of action is to be sought, and not through a senseless attempt to render each citizen equal to and independent of every other; so amongst States themselves, it is by the assertion of international rights and the recognition of international obligations, and not their renunciation or their repudiation, that national liberty and independence will best be secured. And this, I think, must not be left entirely to what are called "moral forces," but must be accomplished by some form of international organisation devised in time of peace, yet strong enough to withstand the "tug of war." No one attaches greater importance to opinion, or holds more firmly than I do to the maxim that all sovereignty, all real power, national and international, centres, necessarily and rightfully, in the general will. Deliberately expressed, and faithfully interpreted, the *vox populi* is, indeed, the *vox Dei*—it is the form in which the divine will expresses itself, for the time being, with reference to passing events. But the sovereign fiat of the general will are not those to which it gives the loudest and most tumultuous utterance; and, if we accept these as such, we shall find to our cost that, though the general will cannot be resisted, it may be readily misinterpreted. Whether it be the will of a single State with reference to its domestic affairs, or the will of a community of States with reference to their common concerns, the general will speaks intelligibly only through the medium of arrangements which take cognisance of the relations of the various members of the body of which it is the motive power. And as this deliberate will is not a self-interpreting, so neither is it a self-vindicating, oracle. Like other potentates it acts by means; and its decrees will be effectual only when they are carried into execution with a steadiness of purpose which shall leave no question as to their sincerity; for amongst States no less than amongst individuals certainty is of the very essence of vigorous action.

When I think of the wars which we have recently beheld, both in Europe and in America, and of those which apparently are still impending, I am not so sanguine as to hope that the era of perpetual peace will come in my day, or even in yours. I do not presume to say whether the congress of the representatives of the parties to the treaty of Vienna which was proposed by the Emperor of the French in 1863 would, or would not, have untwined the complications which existed, or averted the disasters which have since cost the lives of more than a million of human beings. But of this I feel assured, that, inasmuch as independent States can have no other law, their progress towards unimpeded internal development is possible only by such common consent as shall enable them to be a perpetual law unto each other. Such phrases as the "balance of power" and the "federal system of Europe" may express but imperfectly the requirements or possibilities of the present age. If so, let modern equivalents be found for them. But if the principles which they once embodied be abandoned—if the absolute independence and entire irresponsibility of each separate community be proclaimed, the positive law of Europe is abrogated; and, as communities, we are again in that condition of anarchy which has been very erroneously characterised as the state of nature. The principle that we will fight only in self-defence—if that principle be understood to mean that we will fight only to defend our own borders, or when our own immediate and apparent material interests are at stake—is a principle which can avail only the strongest; and, as the strongest absolutely, at any given time, can be but one, would open the door to a universal monarchy, or what most of us would still less willingly trust, a universal democracy. With such agents as Christian truth and intellectual culture at work, the possibilities of the future are indeed infinite; but till man becomes a very different being from what he is, the only guarantees against unjust aggression, I fear, must continue to be authoritative mediation in the first instance, and armed intervention in the second.

It follows as a consequence of the necessity of recognising facts, if need be, by a frequent modification of positive law, that wherever supremacy has become real, the forcible assertion of a hegemony, like that which Prussia has just vindicated, should be anticipated by peaceable concession. Were the mutual responsibilities of States recognised and acted on, one of the first duties of such members of the family of nations as chanced to occupy a neutral position would be to effect such concessions, and to readjust an order of procedure which changes of circumstances had invalidated. The difficulties of the task would in most cases be great, and in many probably insurmountable. But even where an

accurate adjustment of law to fact is impossible, some approach to it may often be made, and the rest may then be intrusted to those indirect influences which the stronger will always bring to bear on the weaker, with more or less detriment to the moral well-being of both.

Now, so far was this adjustment from being effected amongst the States of Germany, that Prussia, with something like sixteen millions of German inhabitants against Austria's eight millions, was not only deprived of the leadership of the Diet, but it was declared to be a fundamental principle of the Confederation that all its members, as such, should be entitled to equal rights. And this principle was carried out with a wonderful, and, as events have proved, a fatal approach to accuracy. In the ordinary assemblies of the Diet no State enjoyed more than one vote; and Prussia was thus placed on a footing of equality with Würtemberg, Baden, the Hessen, Holstein, and Luxemburg. But the rule was too absurd to be applied in its integrity. Some of the very smallest of the States were grouped together, and the free towns had only one vote amongst them all. In the Plenum, or General Assembly, the body to which the weightier affairs of the Confederation were confided, this absurd principle was confessedly abandoned, and something like an approach was made towards establishing a proportion between the legal and the actual weight of the different States. Four votes were given to the greater States, and three, two, and one to the lesser ones, as their real importance diminished. But even here Saxony, Bavaria, Hanover, and Würtemberg were declared to be the equals of Austria and Prussia, whilst Austria, by presiding, retained her pre-eminence.

In these and many other respects the constitution which was framed in Vienna in 1815 contrasts very unfavourably with that devised at Münster in 1648. The old empire, with its three hundred and fifty-five sovereign States, was a complicated and cumbrous machine; but very various relative values were assigned to the various feudal, ecclesiastical, and municipal members of which it was composed, and there can be little doubt that it took pretty accurate cognisance of the relations of the different elements of the body politic as it existed in Germany in the seventeenth century. Unlike the French Revolution, which confused and bewildered the generation on which it fell, and arrested all rational inquiry into the laws by which social relations are governed, the Thirty Years' War solemnised men's thoughts without blunting their intelligence. Neither in Germany nor elsewhere did the treaty of Westphalia occasion the exasperation or excite the ridicule which have justly assailed that of Vienna; and many of its provisions will stand forth as monuments of the

wisdom of their framers. But even the stupefying effects of the Revolution seem scarcely sufficient to account for the fact that so rude and inefficient a contrivance as the Bund should have been the outcome of the deliberations of statesmen and jurists in the century in which we live. Yet the outrages on common-sense which it exhibits, however unaccountable, are not singular. Of all the lessons which history teaches, there is not one which has been inculcated by more frequent and terrible examples than that inequalities which are real, if not legally recognised, will assert themselves in opposition to law. But so unteachable is mankind, that the lesson which this most learned and thoughtful German nation has just rehearsed in one direction with blood and tears, it has already forgotten in another. Whilst the equality of States is abandoned as a delusion and a mistake, the very same voices which have just renounced it are lifted up in a chorus of supplication to Heaven for a German Parliament elected by equal and universal suffrage!

When we reflect to how very much greater an extent human well-being is dependent on ethical and political than on metaphysical or even physical science, nothing seems more surprising than the heedlessness and incapacity which mankind exhibit with reference to the former, and the zeal, energy, and intelligence with which the latter is cultivated. It was so even in Greece; and we moderns, whilst there can be little doubt that we have outstripped all previous ages in physical discovery, have scarcely yet begun to deal rationally with human relations at all. The investigation of the abstruser problems of ethics does not probably admit of being carried greatly beyond the point which it has already reached. But what has been done in ethics hitherto, compared with what may be yet accomplished, is like the discoveries of pure geometry as compared with the sciences of natural philosophy and chemistry and their applications in engineering and the arts. Just as in physical science it is in applied science that progress is made, and not in abstract theories of space and number, so it is in the application of the principles of ethics to politics and jurisprudence, and not in speculations which amount to nothing more than their reassertion and revindication, that progress is possible. And even if it *were* possible in this latter direction—even if a man were actually to explain the origin of sin (which no man, I think, ever will explain)—I doubt if he would confer as great a boon on his erring fellow-mortals as if he were to teach them to avoid a single transgression, by adjusting principles of morality, with which they are perfectly acquainted, to circumstances in which their course of action is not plain to them. Take circumstances, for example, in which it is necessary to draw a distinction between the duty of

reconsidering a resolution, or even repenting of a vow, and the duty of fulfilling a covenant, or obeying a positive law till it can be legally repealed. I select this instance because, having spoken of the demoralising effects of the open violation of treaties, I wish to point out to you a demoralising influence in the opposite direction, which is very actively at work in our own country, arising from the mistaken belief that statesmen are bound, under all changes of circumstances and at all hazards, to redeem what are called "pledges." Now, I think I shall run no great risk of invalidating the duty of truthfulness as the general rule of human conduct, or of pushing the art of casuistry beyond its legitimate limits, if I make the two following assertions with regard to political engagements of this description:—1st, that they ought never to be made; and 2d, that, if rashly made, the duty of reconsidering them again and again, in the light of every new fact, and every fresh argument, remains undiminished up to the moment when action becomes imperative. In making these assertions, I am happy to be able to fall back on a very great and recent authority. The late Archbishop Whately, though known to most of you, I dare say, chiefly as a logician and a theologian, was scarcely less distinguished as a political philosopher; and I regard the publication of his life and correspondence as perhaps the greatest event, with the exception of the German war, which has occurred, for our purposes, during the long vacation. In the first volume of the work in question (p. 293) the Archbishop's chaplain thus reports to his friend Mr. Senior the thoughts which he had thrown out on the practice of requiring and giving pledges:—

"The measures-not-men party have much that is plausible at first sight, and at present they have put themselves forward, or are likely to do so, in a manner calculated to attract approbation. But, on consideration, it may be shown that this system involves the most complete democracy. Those electors who demand pledges upon any question, and vote in consequence, belong to this party. Instead of selecting the individual to whose discretion it seems best to intrust the interests of the country, they resolve on the measures, and support those who promise to maintain them. . . . But what method can be adopted to stop the pernicious system of requiring pledges? This should be stopped by the firmness and honesty of candidates; but it is vain to rely on these qualities. *The Archbishop proposes that a member should lose his vote and right of speaking on any point when he is known to have given a pledge.* After this he is not free to deliberate; he is no longer, on this point, to be regarded as a member of a deliberative body, and should forfeit his right of acting."

So much as to the morality of forming such engagements. As

to the morality of public men adhering to them, after they feel that they bind them to what they no longer approve, the good and wise Archbishop, in his 75th year, thus expresses himself :—

“One of the merits most pretended to is consistency—or, perhaps, I ought to say—one of the reproaches most dreaded is, the reproach of inconsistency. We see people trying to avoid it by persisting in what, in their own inward minds, they acknowledge to themselves to be error. Now, inconsistency of conduct may arise from three causes:—1. Change of circumstances; 2. change of opinion; 3. the co-existence in the mind of contradictory opinions. In the first of these cases change of conduct is almost always a proof of wisdom. It is very rarely that, under altered circumstances, persistence in the same conduct is advisable. Secondly, as long as man is fallible, a change of opinion must often be right. . . . Thirdly, the co-existence in the mind of irreconcilable opinions of course implies a mental defect. . . . On the whole, it seems to me that a man who prides himself on universal consistency ought not to be allowed to take part in public affairs. He must close his eyes before new facts and his ears against new arguments. He must be intensely obstinate and intensely arrogant.”

Till some really important work on applied ethics shall appear, an enchiridion, composed of such *obiter dicta* as these, would be a more valuable contribution to literature than new dissertations on freedom and necessity, and novel “Theories of Knowing and Being.” It is true that in this dry and thirsty land of empiricism and practicality we cannot be too grateful to the few who direct us to the deeper sources of knowledge. Were it not for the wells they dig for us we should soon have no water at all. But what do wells avail if we have nothing to draw with, or pools of healing waters if no one will put us into them? The moral law must not only be discovered and declared in the abstract, but applied to the circumstances in which we are called upon to act. In metaphysical and ethical philosophy this country has long held an honourable place; and we claim the science of political economy almost as a native growth. But in that middle-region where the rich fields of politics and jurisprudence offer us a golden harvest, Scottish labourers, as yet, have been lamentably few. The reproach is one which it belongs especially to the students of this class to wipe away. And if the greatest of the uninspired sages of old declared it to be his mission to bring philosophy into contact with actual affairs, none of us surely need seek a nobler vocation than to tread a path which still bears everywhere the traces of his feet.

IV.

REASONS FOR THE STUDY OF JURIS- PRUDENCE AS A SCIENCE.¹

Introductory Lecture to the CLASS OF PUBLIC LAW,
January 1868.

"Law is reason itself, as it is versant about the rights of men, and therefore called the law of reason. And can there be anything more congruous to a rational discipline than reason itself and its principles?"—LORD STAIR.

BEFORE entering on the study of the Law of Nations—which is, as you know, the special branch of the science of jurisprudence which has been assigned to me,—it is my duty, as Professor of the Law of Nature, to discuss with you the Science of Jurisprudence as a whole. I am called upon to trace with you its sources; to exhibit to you its absolute characteristics; to indicate its subdivisions, and the method in which it is realised and manifested in the State; and I must further specify, in so far as I shall be able, the relation in which it stands to other kindred branches of that great science which has for its object *human* life,—that is to say, the rational and responsible life of man as opposed to his mere physical existence.

But, apart from the words of my commission, there are two considerations, either of which I should have regarded as almost a sufficient warrant for the adoption of this course. The first of these I share with all my colleagues, and not least with those who

¹ These pages were written for the purpose of being delivered as the Introductory Lecture of the course of Public Law and the Law of Nature and Nations this session [January 1868], before I knew that I should have to intrust to another what to me is as much a labour of love as of duty. They were designed for the members of the profession generally, as well as for my own students; and I have thrown them into this shape in the hope that they may contribute in some degree to advance, during my temporary absence, the studies which it has been, and will be, the object of my life to promote.

J. L.

[Professor Lorimer was absent owing to ill-health during the session 1867-68. This lecture was not delivered, but was published and distributed to students and to members of the legal profession. It has frequently been used in the class in subsequent sessions, and has been considerably altered and enlarged.]

occupy the chairs of municipal law. It is the importance which every academical teacher, every educated lawyer, and indeed every intelligent man, must attach to the starting-point of a race of which the issues are so momentous, to the roots of a science every branch of which, of an art every exercise of which, brings us in contact with the whole range of man's interests, and proves to us how intertwined are the threads of the web of life,—“*wie Alles sich zum Ganzen webt.*”. The second consideration is peculiar to the branch of positive law which will form the subject of our more special studies,—a branch which, as I shall have many opportunities of explaining to you hereafter, stands historically, and, in the present stage of its development, necessarily, in a very close relation to the parent tree, and demands a very frequent recurrence to the fundamental principles of jurisprudence.

But though, from the dependence of the law of nations on the law of nature, the relation between these two branches of jurisprudence be a peculiarly intimate one, let me warn you at the very outset against supposing that this relation is one which has anything exceptional in its character. So far is this from being so, that the preliminary task which I am about to undertake might, at least theoretically, be undertaken with equal propriety by any one of my learned colleagues,—the Professor of Medical Jurisprudence scarcely, and the Professor of Conveyancing not at all, excepted. When the great father of international law, as a special science, assigned as its sources “*Ipsa natura, leges divinae, mores, et pacta,*” he enumerated the sources of all law, public and private, national and international, civil, criminal, and ecclesiastical. His dictum would have had the same truth in the mouth of a municipal lawyer as of a publicist, and his words might be used now by the Professor of Scottish Conveyancing when speaking of the ultimate sources of his science, quite as justly as I can use them when speaking of what are likewise the ultimate sources of mine. It is only when seen from this higher and more absolute point of view, indeed, that any of us can claim for his special subject the character of a science, or that we are entitled to talk of a science of jurisprudence at all, either in whole or in part; for, as Mr. Mill has very justly remarked, a science, in the only proper sense of the term, is an inquiry into the course of nature.¹ If you wish to be

¹ Kant, in his *Metaphysic of Ethics*, defined the science of law to be “the systematic knowledge of the principles of the law of nature, from which positive law takes its rise, which is ever the same, and carries its sure and unerring obligations over all nations and throughout all ages.” But the science of law may also include a systematic knowledge of positive law, which is the interpretation put on the law of nature by the general consciousness of an independent community, and the means devised for its vindication for the time being.

convinced of the necessity of the study in which we are to engage, just ask the first *practical* lawyer you meet what *he* means by the science of jurisprudence, and compare his answer with that which you will receive if you put a similar question to a chemist or a physiologist, or even a medical practitioner.

But though the reasons which have linked the law of nature to the law of nations, and induced the publicists of former times to travel into the domains of the moralist and the theologian in search of the roots of their special science more frequently than the cultivators of the other departments of positive law, be thus reasons of convenience, or at most of practical and not of theoretical necessity, they are reasons which, remaining in a great measure unchanged, fully justify those who have imposed the duty of teaching the law of nature on the tenant of this particular chair. As we proceed in our investigations these reasons will become plain to you, and, I doubt not, will commend themselves to your approval on other than traditional grounds. All that I desire to impress on you for the present is, that they are not absolute reasons, and consequently that the preliminary discussions in which we are about to engage are of general application, not having reference to public law alone, and not less available for those of you who are to devote yourselves to the practice of municipal law, than to those who shall determine to embrace the functions of the diplomatist, or to take part in the public life of the State.

I dwell upon the general import of these higher and more abstract studies with the greater anxiety, because I have reason to believe that the relation between the law of nature and the various branches of positive law, plain and indisputable though it be, is a subject with reference to which a good deal of misapprehension prevails, not only in the popular but in the professional mind of this country. Of the law of nature, as we shall see more clearly hereafter, one or other of the following erroneous notions is too generally entertained :—

1st. It is supposed to be a sort of primitive code, or body of consuetudinary law, which prevailed in the so-called "State of Nature," and regulated the scrambles for nuts and acorns which threatened to mar the fraternity and disturb the equality of the interesting citizens of that ideal democracy. How this important groundwork of subsequent legislation was preserved to us is not generally explained. But without calling its authenticity in question, I think we may dismiss it with the remark that—like the "Primitive Contract," which belongs to the same school—it assumes the existence of the regulations—whose origin it seeks to explain. It is, in short, a system of imaginary positive law, which differs from systems of real positive law only in this respect, that it is a peculiarly bad one.

2d. The law of nature is mixed up, in some confused and indefinite way, with the law of nations, either as a primary department special to that branch of jurisprudence, or as identical with those rules of it which rest on consuetude and not upon treaty. Of the former of these suppositions I have already spoken, and as we advance you will see more and more clearly that the notion of any such exceptional relation rests on a misapprehension, not of the character of the law of nations alone, but of positive law altogether. For the latter supposition, which identifies these two great subjects more or less entirely, much more apology has been given, not only by the writings of some celebrated jurists, but by the practice even of the modern world. Till an international legislature, an international tribunal, and an international executive have become realities, in place of mere philanthropic dreams, the law of nations will be little more than the law of nature, as each nation chooses to interpret it. But then it is the law of nations which, by losing the character of positive law, thus falls back into the law of nature, and not the law of nature that, by arrogating to itself the character of positive law, identifies itself with the law of nations.

Putting aside, then, these erroneous conceptions, together with any hazy and indefinite notions about "general principles," in the sense of widely applicable rules, which you will find in the prefaces of many practical treatises, and with which popular orations are often garnished, let me try if I can tell you, in a general way to begin with, what the law of nature is understood to be by those who have devoted themselves to the study of scientific jurisprudence in other countries.

Natural law is the conception of Kosmos, as we believe it to exist in the mind of the Creator, and as it is revealed to us, mediately or immediately, by Him. When studied with reference to human relations, this God-given law professes to supply us with the rule of absolute justice, to tell us what is due by every human being to all human beings, and by all human beings to every human being. It is true that it does not tell us expressly how we are to act towards each other in all circumstances, or indeed in any circumstances. For this information we must always be, in part, beholden to the second factor in legislation—a knowledge, viz., of the circumstances themselves. But it tells us what *end* we are to seek, with what *purpose* we are to act or to refrain from acting, what, by active or passive means as may be most possible, we must strive to accomplish. When we say that natural law does not profess to supply facts, but only principles, we are apt to be led into false conceptions by a distinction which is very often little better than an apology for the absence of any

conception at all. Natural law supplies, it is true, only one class of facts, viz. the permanent facts of nature. But the contribution is a very important one; for the permanent facts of nature determine the permanent requirements of humanity; and these, *together* with the accidental and transitory facts which indicate the local and temporal requirements of the portion of humanity for which we desire to legislate, supply the whole conditions requisite for framing a perfect positive law,—perfect, I mean, in the relative sense in which alone positive law can be perfect. Natural law alone can in no case, under no circumstances, with reference to no relations, either public or private, supply the place of a single legislative enactment. In international law, in so far as it is not dependent on treaties, the place of a legislation is supplied, not by the law of nature, but by the customs and usages of nations, by which natural law has been imperfectly interpreted and partially realised. Or, to take a familiar illustration of its office in internal legislation: the law of nature will not draft bills for us, or tell us directly what their clauses were intended to mean; but it will tell us with what object bills ought to be drafted, and what their clauses, taken as a whole, ought to mean. In addition to its primary function as a source of legislation, it is thus evident that natural law will often act as a very important organ of interpretation.

It is true that this permanent element of legislation as little admits of being determined with absolute certainty as the transitory one; for though the law be divine, our knowledge of it is human. In the one direction, as in the other, we know but in part, and must be contented to prophesy in part, and all positive law is thus necessarily incomplete. But all legislative progress depends on the approximate discovery of these two factors; and all positive law that is not mere error is the local and temporal embodiment, more or less perfect, of natural law, more or less known.

From these few preliminary remarks, which necessarily partake of the character of assertion rather than of demonstration, or even of satisfactory exposition, I think you will see that the law of nature, far from being the imaginary code of an imaginary state, is in all men at all times, most of all in the highest men in the highest stages of civilisation; and that, in place of being a special branch of jurisprudence, or standing in a special relation to any single branch, it is the common root from which all the branches alike derive their nourishment. Like the root of the tree, the sap which it generates is common property; and the doctrines which it teaches, if they be true at all, are as true for the taxing of an account as the adjusting of a treaty, and govern the conduct of the Auditor of the Court of Session when deciding the controversy

between two rival agents about a single fee, just as they govern that of the Secretary of State for Foreign Affairs when regulating the most momentous relations of his country with other countries. It is not with reference to time and place alone, but as indicating the fundamental unity of the various departments of jurisprudence, that Cicero says, in the *Republic*: "Nec erit alia lex Romæ, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit," for he adds, "unusque erit communis quasi magister et imperator omnium, Deus."

I am very far from saying that the municipal lawyer will be called upon to consider the principles of natural law, of universal justice, either with the same frequency or under the same feelings of responsibility as the publicist. In the case of the latter, it is positively appalling to reflect on the gigantic character of the interests with which he has to deal, and on the miseries which may be inflicted on mankind, almost in a moment, by his failure to seize the true meaning of a rule which he undertakes to enforce. An instance of this occurred in the early part of the late American war, which would be quite incredible were it not for the unquestionable character of the testimony on which it rests. You know that our cotton-famine, for one thing, was caused by the blockade of the Southern ports of America by the Northern States, and that it was this blockade also which, by placing the Southern States in the position of belligerents entitled to commission ships, led to the whole of those complications connected with the administration of the Foreign Enlistment Acts which have so disturbed the harmony between this country and America. Well, the blockade, it seems, was a mistake; I do not mean a mistake of policy, but a mistake of ignorance and want of thought. "When the war broke out," says Mr. Thaddeus Stevens, the venerable President of the Chamber of Representatives, "my opinion was that it ought to be treated as a simple rebellion, and that all those who took part in it ought to be considered as traitors against the Government of the United States. It was thus that Congress understood it; and I supposed that Mr. Lincoln and his Cabinet understood it in the same way. After the termination of the first session of Congress which took place under Mr. Lincoln's presidency, and very shortly after my return home, I read, to my great surprise, a proclamation, declaring the blockade of the rebel ports. It was a gross mistake, and an absurdity. If the rebel states¹ were still part of the Union, and only in revolt against the Government, we were establishing a blockade against ourselves; we were blockading the ports of the United States. I immediately attributed the affair to the incomprehensible policy of Mr. Seward,

¹ The Americans always talk of it as a "rebellion" still.

and set off for Washington to see the President, Lincoln, and speak to him on the subject. I explained to him my view of the matter. I said to him that the blockade annihilated the position originally taken up by the Government with reference to the rebel States; that the ports, in place of being blockaded, ought to have been shut; and that all that was requisite was to have armed a sufficient number of the vessels of the coastguard to prevent contraband. I explained to him that by the mere fact of the blockade we recognised in the rebel States the character of independent belligerents, and that we should henceforth be forced to conduct the war not as if we were extinguishing a revolt, but with all the formalities of international law.

“‘You are quite right,’ Mr. Lincoln said, after hearing me out, ‘I see the distinction now. But I knew nothing about international law, and I thought we were quite *en règle*.’

“‘As an advocate, Mr. Lincoln,’ I said to him, ‘I should have expected the difficulty at once to present itself to your mind.’

“‘The reason, don’t you see,’ replied Mr. Lincoln, ‘is this. I was a pretty fair advocate in one of our Western Courts; but we have very little international law down there. I thought Seward had been up to all that sort of thing, so I let him have his way. It’s done now, and we can’t help it. We must make the best we can of it.’

“‘In that Mr. Lincoln was right. The mistake was made, and the rebel States from that time were an independent belligerent, —I don’t say, mind you, an independent nation,—but certainly an independent belligerent, whom it was necessary to treat according to the rules of international law.”¹

Now, apart altogether from any acquaintance with the positive rules of international law, nay, though there had been no such rules, I maintain that this blunder could not have been committed had these two eminent men been in the habit of regarding law of any kind in the light of reason. However limited might have been their knowledge of the practical working of a blockade, they must have known that it involved the exclusion of neutrals from the blockaded ports by warlike means; and it could not have failed to occur to them, that if one friendly nation was to fire into the ships of another friendly nation, and sink them in the sea, it must do this in virtue of some very different relation from mere friendship. That that relation could be none other than neutrality, and that neutrality must imply belligerency, and belligerency the existence of *two* belligerents at least, were further conclusions in the laws of war to which anything like an untrammelled exercise

¹ Translated from the *Journal des Débats*, October 1867.

of mother-wit must surely have led them. It was their anxiety to act according to rule that prevented them from acting according to reason; and the case, though exceptional in magnitude, was not, I fear, so exceptional in character as we are apt to imagine. I believe, indeed, that not a few of the blunders that are committed in sudden emergencies by consuls and by captains in the navy arise from a hasty and imperfect reference to Wheaton or Vattel, and would be avoided if they had neither Wheaton nor Vattel to refer to, but carried about with them in their heads some sort of rational conception of the principles of General Jurisprudence, which are neither more nor less than the principles of common-sense.

In the practice of the municipal lawyer, it may be urged that the "occasion sudden," which would entitle him to revert to the spirit, without inquiring into the letter of the law, is scarcely a conceivable occurrence. Be he agent, counsel, or judge, the first question with him must be, What is the existing law of the land? The question is one which, in organised states, nearly always admits of an answer, and with the absolute truth or falsehood of that answer the practitioner, *qua* practitioner, has no concern. The law must be administered whether it be wise or foolish. But its folly—which means its divergence from nature—must not be hastily assumed; and therefore, as an instrument of interpretation, if not as a standard of criticism, the law of nature may be of no small practical value, even to the practitioner of municipal law.

But the municipal lawyer is not necessarily a practising lawyer solely. In England, the evening of the day that is spent at the Bar is not unfrequently devoted to the House of Commons; and even in Scotland the Legislature is the arena in which all practising lawyers of the more ambitious class hope, ultimately, to gain a reputation which shall not be bounded by the Tweed. Moreover, even when they stop short of exercising the function of legislators directly, most lawyers of intelligence exercise it, in no inconsiderable degree, as members of the bodies to which they belong. The Faculty of Advocates has no recognised existence for legislative purposes; and yet it is not perhaps too much to say that one-half of the statute-law of Scotland is the result of reports prepared by its committees, and discussed and adopted by its members. The Lord Advocate being always a prominent member of the body, Bills framed from these reports are very often introduced by him into Parliament as Government measures; and if they have reference to the amendment of the law, they generally pass through the House without opposition,—the lay representatives of Scotland accepting them on his Lord-

ship's authority, whilst the English members pay them the equivocal compliment of sleeping or dining during their discussion. With exceptions so trifling as scarcely to merit that we should take them into account, all laws about law may thus be said to be lawyer-made. What I have said of the Bar may be said in a limited sense of the other branches of the legal profession, of such mercantile bodies as Chambers of Commerce, and indeed of the whole self-governing community, which, in these times, has become a very wide word. Now, the moment we venture on legislation, we are bound to go back to first principles, and ascertain, not what the law is or was, here or there, but what it ought to be, here and now. "It is the philosophy of law," says Professor Röder, "which leads the mind beyond the narrow limits of existing legal and political relations, exalts it to a higher standing-point, widens the range of vision, awakens and trains the independent judgment, quickens the sense of right, and prevents the inroads of that narrow-minded bigotry so hostile to progress, in the estimation of which everything that passes current exists of necessity, and everything that does not pass current is impossible."

In your capacity of legislators, then, if not of legal practitioners, you will find no want of practical employment for the principles of universal jurisprudence; and there is scarcely a question which agitates society at the present moment with reference to which your opinions will not be influenced by the school of jurisprudence to which you shall give in your adhesion. Are the rights of private property, for example, absolute? Is man, as Kant teaches, an isolated being, whose whole relations to his fellows are summed up in the word *non-interference*? Or do these rights involve limitations and imply active duties; and if so, to what extent and with what objects shall they be limited? These are inquiries which obviously must precede all poor-law legislation, all educational legislation, all legislation with reference to the tenure of landed property, to public institutions and public works, and indeed all taxation—for if we adopt the negative theory of jurisprudence in its integrity, taxation, whatever its object, becomes identical with confiscation; whereas a very slight misconception of the positive theory will land us in communism, and identify property with robbery. Then, again, when and how far must the central right of personal freedom—which the negative school of jurisprudence rightly, as we believe, has declared to be the very object of our science—be restrained in the individual or in the community, in its own behalf and with a view to its own ultimate realisation? These are questions preliminary to all criminal laws, to all laws of guardianship, to all international

intervention. In each and every such case, previous to all discussion of means, before the statist or the economist can claim a hearing, it belongs to the scientific jurist to determine whether the proposal be or be not in accordance with justice; in other words, whether or not it be a realisation of laws which we did not make, which we cannot abrogate, and which assuredly will vindicate their supremacy in the end, however great may be the facility with which we seem to ourselves to set them at defiance for a time.

But apart from legislation, in which the interests of the lawyer identify themselves with those of the citizen, there is one sphere of what I think I may call direct professional activity, in which it will be at once apparent to you that an acquaintance with the ultimate principles of jurisprudence is indispensable to the success of any efforts which are not of the humblest kind. I refer to the literature of the profession. It has been said that every professional man owes a debt to the literature of his profession. If this be true of the individual, how much more is it true of the generation? It is a poor generation which can do nothing more than pass on the tradition which it has received; and it is a poorer one still which mars or mutilates it in the transmission. The lawyer who does not live for the law, as well as by the law, is not worthy to live at all. But in order that the cultivator of scientific jurisprudence may serve her loyally, he must regard her not as his handmaid, but as his bride. He must not seek merely to avail himself of her services to help him through the world, but he must serve her with the zeal and devotion of a lover, not seeking his own, but hers, and finding, as all true lovers do, his richest recompense in the championship of her cause, in the truth which she has privileged him to proclaim.

But for several generations, from causes¹ to which I cannot here refer, all attempts at the cultivation of the philosophy of law were abandoned; and, as a consequence of letting slip our hold on this higher standing-ground, it has unhappily come to be the

¹ Though the cause is not explained, the fact is established with distressing conclusiveness by the relative condition of the Advocates' Library in our own day and in that of our great-grandfathers. Up to the period of the French Revolution, very few works on scientific Jurisprudence appeared in Europe which are not now to be found on our shelves. Of those which have appeared since the time of Kant we have scarcely one; though the learned press of the Continent has literally teemed with them, and the study has undergone an entire revolution. Let me give one instance out of hundreds: The "*Cours de Droit Naturel ou de Philosophie du Droit*" of M. Ahrens is the text-book used in the Ecole du Droit in Paris. In 1860 it had reached its fifth edition. It has been translated into Italian, Portuguese, Spanish, Dutch, German, Hungarian, and Chinese, and—there is no copy of it in the Advocates' Library!!

custom amongst us to consider that a professional book ought to consist of little more than a collection of the dicta of two or three of our older text-writers, together with an accurate statement of such new points, in the department treated of, as chance to have been legislatively or judicially determined. Where a question seems still to be open, a slight and hesitating reference may perhaps be made to the practice of England or America, or a timid attempt at a solution by the analogy of other decisions on kindred questions. But the expression of any opinion arrived at by the author on ultimate grounds is carefully avoided, not, it is to be feared, from motives of modesty, which, if genuine, ought to have restrained him from writing the book altogether, but partly from an impression (which I hope and believe is, in the main, erroneous), that his prospects of professional employment would be endangered by a reputation for speculative leanings; partly also, I dare say, from the tendency to shrink from any independent mental effort to which the habit of compilation and the performance of mere routine-work inevitably give rise.

Now such was not Lord Stair's notion of a professional book, or of the duties of a professional author; and if you were to ask me to mention to you what I conceive to be the chief reason why his great work, though hidden from us by the mists of nearly two centuries of change, still shines through the mediocrity of later writers with such a blaze of splendour, I would tell you that it was because he was free from the notion that the art could be separated from the science of jurisprudence. You will say that the secret of Lord Stair's success as an author was that he was a man of much greater personal ability, far more gifted by nature, than any of his successors; and that is very true. You will, perhaps, say also that he was a better civilian; and that may be true, though it is not quite so certain; for Lord Stair had not the advantage of being educated at a foreign university, as was the case with most of our lawyers at the period in which he lived, and I doubt if he ever had as good a teacher as my learned colleague Professor Muirhead. He was not even trained to the Law at all in early life; and though he afterwards made a study of the Roman system, and often refers to it familiarly, still Mr. Erskine and several of our other writers give evidence of having been, in this and all other respects, eminently well-informed lawyers. But supposing this advantage also to have existed in favour of Lord Stair, and though his great experience as a judge may have called his attention to the importance of matters the bearings of which would naturally escape one who, like Mr. Erskine, was comparatively a man of the closet, still the great distinction between these two writers, whom I may adopt as typical of two classes, arose from none of these

causes. It arose from the difference between the points of view from which they respectively regarded the whole subject of Jurisprudence. Lord Stair regarded it scientifically, Mr. Erskine regarded it mechanically. To Lord Stair it was a branch of the science of nature,—a natural science, which, if it was to be cultivated at all, must be cultivated by patient and reverent inquiry. To Mr. Erskine it was a subtle human invention, with the historical development of which he was not unacquainted, but into the ultimate sources of which, if it had any sources beyond the will of the legislature and the accidents of time and place, he scarcely ventured to inquire. In Mr. Erskine's day, it is true that it was still the fashion to affect some acquaintance with the philosophy of law; and accordingly we find in his work a good deal of preliminary matter, quite as much as is to be found in Lord Stair's, and more than seems necessary in a municipal treatise. He has a separate title on "Laws in General," in which he quotes Tully and Grotius, and Puffendorf, and Heineccius,—of whom the two first ought not to have misled him. He defines the law of nature after Grotius, and tells us, in accordance with some of Cicero's well-known dicta, that it is of "unchangeable obligation." But when he comes to speak of human laws, his own notions come to light; and in place of regarding such laws as attempts more or less successful to realise and vindicate this unchangeable law, he seems to consider their chief function to consist in changing it. He talks of them as laws which are "superadded to the law of nature." He informs us that the "supreme power," meaning thereby the legislative power of the State, is entitled "not only to superadd, but even to circumscribe, or set bounds to, the law of nature;" that there are laws "which are barely civil, which derive their whole force from the arbitrary will of the lawgiver, without any obvious foundation in nature," and that there are others which, "by adding to, or varying from that law, give a particular modification to things which nature had left undetermined."

It is very sad to find such expressions as these in a work of so much practical utility that for more than a century it has formed a sort of model for our professional literature; and one cannot be too thankful that, for so long a period, the local character of these practical books has sheltered them from the criticism of the learned world without. With Lord Stair, whose work was published nearly a century earlier, everything is different, and even at the present day Scotchmen might be proud to see his treatise translated into every language in Europe. Lord Stair boldly proclaims that "law is a rational discipline," profitable "not only for judges and lawyers, but for all persons of honour and distinction;" and that for this reason "I did resolve to raise my thoughts and theirs to a

distinct consideration of the fountains and principles of the peculiar laws of all nations, which common reason makes intelligible to the judicious when plainly and orderly proposed; and therefore have always in the first place set forth that common rule of material justice by which mankind ought to govern themselves, though they had no positive statutes or customs; and then shown how these are thence introduced. . . . No man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world, from whence the interpretations, extensions, and limitations of all statutes and customs must be brought." Lord Bacon himself has said nothing finer or truer than this. In his dedication to the king, Stair again lays claim to this absolute character for his work: "There is not much here asserted on mere authority, or imposed for no other reason but *quia majoribus placuerunt*; but the rational motives inductive of the several laws and customs are herewith held forth." Nor is this boast a mere preliminary blast of the trumpet. Throughout the whole of the special portion of Lord Stair's voluminous treatise this absolute tone is consistently maintained; and you quit it with the feeling that the municipal law of Scotland, of the rational and untechnical character of which Stair was justly proud, rises in the hands of its great expositor very nearly to the character of "reason versant about the rights of men."

Now, of these two eminent persons, Lord Stair and Mr. Erskine, the fruits of whose labours were so different, we cannot say that the one was a more diligent or devoted cultivator than the other of the field in which the lives of both were spent. We know very little of the habits of either of them, but if we knew more, it is very likely that the palm of diligence might fall to Mr. Erskine; for it may naturally be supposed that, during his tranquil life, he read more, and more carefully, than did Lord Stair, during a life that was not much longer,¹ and was full of vicissitude and danger, and burdened with responsibility and anxiety. But they were, as I have said, students of different schools; and the different directions which they took, in addition to natural idiosyncrasies, may, I think, be explained when we bear in mind an anecdote of Stair's earlier life, which has generally been regarded only as a picturesque episode in his story,—I refer to his appearance, in buff and scarlet, as a candidate for the chair of Philosophy in the University of Glasgow in 1641. We know nothing of the character of the so-called "Competition" in which he engaged; but whatever its character was, he succeeded in it, and held the Chair of Philosophy for six, some say ten, years. The studies and occupations of these years naturally and inevitably left lasting traces on his mind; and

¹ Lord Stair died at seventy-seven, and Mr. Erskine at seventy-three.

at the age of seventy, when an exile in Holland, we find him not only revising his *Institutes*, and recording the more important decisions which had taken place during his first presidency, but associating with philosophers and writing philosophical tracts. It is always difficult to link facts together as cause and effect; but I think you will agree with me in inferring some such connection between such studies as these and the tone of the *Institutes*, when you reflect that the only Scottish lawyer of great ability, who, after spending his early life in philosophical pursuits, applied himself in maturity to the practice of the law, was at the same time the only one who was able to see our municipal system in the light of a science, and to produce a treatise of permanent interest and importance.

And this inference receives a curious confirmation when we find the same facts repeated in the case of the greatest judicial thinker whom England has produced in modern times. Lord Stowell is not indeed the author of any systematic treatise; but his judgments, which by universal acknowledgment are the most perfect performances of the kind within the whole range of legal literature, are marked out from the judgments of other English judges by the very same characteristic which distinguishes the treatise of Lord Stair from the works of other text-writers on the law of Scotland. His point of view is likewise an absolute one, and in giving you the law he consequently gives you also the reason of the law. Now, Lord Stowell, like Lord Stair, passed his early life at a University, not as a student only, but as a teacher. For ten years, or more, he was a tutor at University College, Oxford, before he was called to the Bar, or indeed commenced the study of the law at all.

I might multiply similar examples; but I shall mention only one more, which is too conspicuous to be passed over in silence. It was as a scholar that Hugo Grotius was first known to the world; and, during the whole of his agitated and important life, he was quite as distinguished as a theologian as he was either as a jurist or a diplomatist.¹

I think it very important that I should bring these instances of the effect of liberal studies on directly professional pursuits before you at the present time, when public and private liberality, by endowing chairs, and founding scholarships and fellowships in connection with our University, is bringing learned leisure—that indispensable requisite of all higher culture and all sustained

¹ Another example is Professor Bluntschli of Heidelberg, the greatest international lawyer of our time, who was not less distinguished as a theologian than he was as a lawyer. He was President of the Protestantische Verein, and the last act of his life was to deliver the concluding address at its meeting at Carlsruhe, 21st October 1881.—(J.L.)

mental effort except for persons of very abnormal temperament—within the reach of some of you, on whom an early and exclusive application to practical pursuits would otherwise have been imposed; and when the ambition of forming a really learned and philosophical school of law, I hope, will be awakened in many breasts. The somewhat provincial character which, with our best efforts to the contrary, I fear is more and more settling down on our country, points unmistakably to the scientific rather than to the practical side of our profession as the avenue to fame. We cannot give to Edinburgh the political importance of London or Paris or Berlin. The peerage is sparingly opened even to the most brilliant professional success; and those whose object is wealth will continue to seek it in the crowded thoroughfares of our mercantile towns rather than on the dusty boards of the Parliament House.¹ But I can see no reason why Edinburgh should not vie with Heidelberg and Bonn, or why a world-famous school of jurisprudence should not arise in a country in which a world-famous school of philosophy has already arisen.

But it is not only because they ennoble the humbler walks of professional practice by exhibiting in the background the reassuring spectacle of the common altar at which we all serve, whilst they render the higher walks of legislation or of literature less anxious and insecure, that I urge on you these abstract studies. The same studies which give theoretical meaning to our practical life give a practical aim to our theoretical life. By all persons who receive the highest instruction of this or any other European nation, the whole of the earlier portion of life is devoted to studies which are in a great measure theoretical, and several years of it to those which, in the strictest sense, may be called philosophical. As regards these latter, more especially, I have often deplored, and I have heard it deplored by others, that an impassable gulf seems to divide them from the occupations of practical life. It is not denied that, by the sustained and protracted efforts of thinking which they impose, they sharpen and invigorate the mental powers. It is moreover very generally conceded in their behalf that they give depth and seriousness to the character by turning the mind in upon itself, and that they curb the love of mere present gratification, by setting before us the true, the beautiful, and the good as the ultimate goal of life. It is thus that they give unity to our schemes of activity by demonstrating to us the coincidence of duty and self-interest, and by telling us that, whilst virtue is in itself the highest end, it is at the same time the surest means towards the attainment of that happiness after which our nature instinc-

¹ The ancient Scottish "Parliament House," now occupied by the Supreme Law-courts of Scotland.

tively craves. All these, and many other considerations which might be urged in favour of the study of philosophy, are matters of universal admission, and they might well suffice to free it from the imputation of inutility. It was chiefly on the ground of the value which it possesses for the individual, considered as an end to himself and not as an instrument, that Sir William Hamilton, when pleading in its defence, claimed the character of a utilitarian. I fully admit the adequacy of his defence and the justice of his claim. But, standing as a professor in the Faculty of Law, somewhat nearer to practical life, and to those occupations in which man must so often be content to play what Sir William called "the lowly part of a dexterous instrument," I am disposed, in recommending "the generalities," to put my own claim to utilitarianism on somewhat different grounds.

"If any man," says Lord Bacon, "think philosophy and universality to be idle studies, he doth not consider that all professions are from thence served and supplied." Now, it is on this ground,—on the ground of their direct bearing on our own profession in particular, and on your aptitude for the discharge of the functions, practical and scientific, which I conceive legitimately to belong to that profession,—and on this ground alone, that I presume to recall you to studies which you have pursued elsewhere. My desire is to utilise your theoretical studies for professional purposes; and in exhibiting to you the fundamental principles of jurisprudence as a science, I hope to exhibit to you the relation which subsists between this science and the kindred science of moral philosophy. I shall endeavour to show you that all law, mediately or immediately, in so far as it is not directly revealed, rests upon that philosophy of consciousness which Sir William Hamilton taught us, which is regarded as the great tradition of the Cartesian school, and which, in its ancestry, may claim names yet more venerable than either Hamilton or Descartes. The science of jurisprudence unquestionably admits of being evolved from the ultimate facts of nature; and whether I succeed in so evolving it or not, I shall, in even making the attempt, have done something towards bridging over the gulf of which I spoke, and restoring the missing link which ought to bind your theoretical life, as students in the Faculty of Arts, to that practical life, as professional men and men of the world, on the threshold of which you now stand.

V.

(1)

THE INTERNATIONAL SIGNIFICANCE OF RECENT EVENTS.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
2d November 1870.

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IN the summer session of 1843, the great attraction and novelty of the University of Bonn, where I was then a student, was Frederick Christopher Dahlmann. Though new to Bonn, Dahlmann was not new to Germany or Europe. Already past middle life, he had done good service, both as a scholar and an historian; and he enjoyed then, and still retains, a reputation as a teacher of political philosophy second perhaps to that of no man in modern times. But the interest which attached to his past, and the hopes which still centred in his future activity as a practical politician, eclipsed his fame as an author and an academic lecturer. He was one of the "seven professors" whom the shortsighted policy of a despotic sovereign had expelled from Göttingen in consequence of the expression of Liberal opinions—opinions which, like all truly Liberal opinions, were conservative in the truest and deepest sense. The students ran in crowds to hear him. There were not many foreigners, for the habit of frequenting German Universities, which I am happy to think has since arisen, and which is likely to receive an impetus from the events of the present year, had not yet manifested itself; but the wide Fatherland, as on all occasions on which there is anything to be learned, or anything to be done, poured forth its sons of every class and every creed. The first thing that the great teacher said to us was this: "I have always held the old saying for a wise one, that we are neither to weep over human affairs, nor to laugh at them, but to try to understand them." At the distance of seven-and-twenty years, I can recall the expression of the grand, fatherly old man's face, and the firm and earnest tones of his voice, as he laid down for us that simple maxim.

And surely there never was a time or a place in which it was more becoming that we should remember it than the terrible time in which we now live, and the place in which we are now assembled. Unlike the sons of those two great and generous nations to which we are bound by so many ties of memory and of hope, the dreadful task of war has not been imposed on us. It is not the privilege of our calling to tend the sick, or to pray by the dying. No direct action with a view to terminating the struggle is permitted to us as individuals, and scarcely as a nation. In what form then can we, as humble and earnest students of public law, testify the "benevolence" of our neutrality to both parties but by taking up a position of moral and intellectual as well as of material neutrality, and, filled with sympathy, yet free from passion, striving, by a careful contemplation of the phenomena that are presented to us, to aid the combatants themselves, and mankind through them, in reaping the fruits of this harvest of blood and tears?

But is this task a possible one? Putting aside all those hesitations on personal grounds which may well beset the wisest of us, is it in the nature of things that events like those which this autumn have filled people with amazement should be understood to any reasonable purpose—that they could be traced to causes which, had they been known and acknowledged, might have led to their prediction, or that they can now be analysed to the effect of furnishing any reasonable guarantee against their recurrence? To the first of these inquiries, at all events, I can reply in the affirmative.

These events were foreseen and predicted, with what appears now like prophetic insight, by one who was our guest, and who sat in this very chair, not yet one short year ago. If you will read the earlier portion of the last chapter of M. Prévost-Paradol's¹ *La France Nouvelle*, you will find that not much more than a change in the tenses of the verbs would be requisite to convert it into a history of the war of which he was the earliest, and, to men like us, will continue to be the most lamented victim.

M. Paradol was a man of very high and, in some respects, wonderful gifts. It will not do for the rest of us to take for granted that what was possible to him is possible to us. But M. Paradol was no sorcerer. The means by which he worked were

¹ Prévost-Paradol, author of *La France Nouvelle*, and many other works political and literary, had been, since the establishment of the Empire, the leading writer against it in the *Journal des Débats*, and was the most celebrated French publicist of his time. He visited Edinburgh in November 1869, and delivered two lectures on the political and social state of France at the Philosophical Institution. He died by his own hand on hearing of the outbreak of the Franco-Prussian War.

natural means—means which, to a certain extent, are at our command as they were at his, and which would be at our command to a greater extent than they are if we would but cultivate certain moral qualities for which he was conspicuous. In the midst of a nation prone to exaggeration and self-deception, M. Paradol was, I do believe, the honestest and most truth-loving man I ever knew. His heart, as was too sadly proved, was open to the deepest emotions; his sensibilities were so keen as at last to overwhelm his reason. But the idea of taking refuge from what he suffered by the practice of any kind of sophistry, either on himself or on others, was utterly alien to his whole character. What to a mind so subtle must have lain intellectually near at hand was morally forbidden. And it was the same with his wit. He was brilliant beyond the measure of his brilliant countrymen, and the temptation to which the consciousness of his power in that direction exposed him was one which he did not always resist. But though the keenness of his satire may sometimes have embittered defeat, the gratification of victory never for a moment induced him to relax the earnestness with which he pursued his ultimate purpose. To discover the real position of his country, and to expose it in the manner which was most likely to lead to its amendment, without fear of consequences or hope of favour, was the sole and single object of his life.

In his unfaltering pursuit of this object you have the secret of his prophetic gift. It is sad to think with how little hope he worked. On one occasion I endeavoured to console him for the annoyances to which he was continually exposed from the censure of the press, by reminding him that, though with us the press was free, editors and publishers were afraid of the public, and consequently that political speculation in any degree in advance of, or even divergent from, prevailing opinions—which told, in short, anything that was not already “the secret of all the world”—was systematically excluded from the leading periodicals, and, when published separately, could scarcely expect fair play at their hands.

To this he replied—“I feel very quickly what you say so vividly about the tyranny of public opinion in England. I know well that, on that point at least, about freedom of thinking and tolerance for opinion, we fare better than you do. But I do not know which is more irritating—to be stifled and stripped of our intellectual liberty by the narrow tyranny of public opinion, or to speak and write (as we do here) about politics, with the tolerance and even the applause of the whole thinking classes, without producing the least action on facts, and without any practical effect on public affairs. I dare say that the book you judged so favour-

ably (*La France Nouvelle*) has been read, and openly approved, and even endorsed, by the almost unanimity of enlightened Frenchmen; but if I consider the practical result of it, I might as well have printed it in the moon. Here, politics are a kind of interesting tragedy or comedy which is acted before the nation, and she applauds in general the more sensible and the best speakers; but she goes out of that theatre without any resolution to act, and contents herself with the delicate pleasure of having heard and praised good speaking."

These words, like the solemn warning to which they refer, were written in 1868. Had M. Paradol's countrymen given serious heed to him even then, they would have been spared the shame and misery of the greatest disaster that ever fell on so great a people. But, for anything beyond the immediate future, the warning then was all too late; the "decadence," of which he pointed out the signs, had been long in progress, and, in M. Paradol's own opinion, had become irremediable. France could not get back her faith in God, or her sense of duty, because she was told that a nation which clung to virtue by so feeble a bond as the *point d'honneur* was not likely long to hold her own with neighbours actuated by these loftier motives. Her relatively decreasing population, which crippled her for war, had been the result of hereditary sins; and these sins, deeply rooted in the existing generation, had crippled her equally for the only field of exertion to which M. Paradol looked with hope—namely, colonisation on the opposite coast of the Mediterranean.

But France had a still deeper malady which was sapping the very roots of her national life—a malady which, though fully alive to its present inconveniences, M. Paradol was disposed to regard as a normal manifestation of political development. His single error as a politician, as it seemed to me, consisted in the fact that he was resolved to be true to the Revolution *throughout*. He revolted, of course, from much of its history, he grieved over many of its blood-stained pages, but, like a loyal Frenchman of the generation to which he belonged, he accepted its principles *in their integrity*. It was an error, I think, more of feeling than of judgment—an error of the Frenchman rather than of the man. But from whatever cause it proceeded, so it was; and amongst the false principles which M. Paradol thus accepted along with the true, was the principle of absolute equality. As a consequence of this principle, he had, naturally and logically, made up his mind, once for all, to a democratic society. It was, he said, an accomplished fact for France, and an inevitable fact for the rest of the world; and he set himself to discover its corresponding political organisation.

Of the grounds on which I dissent from this principle, I prefer to speak in its relation to external politics, because that is a point of view in which most of us can regard it more dispassionately than in its bearing on the constitution of the State. But this I must say in passing, that, in whatever relation we view it, a condition of existence in which no man must acknowledge another for his better, which sanctions and almost sanctifies insubordination, and from which obedience is, as it were, constitutionally shut out, is, in my opinion, essentially inorganic, and, as such, incapable of becoming the basis of any higher organism. And if this condition of existence (for I can scarcely call it society), when once arrived at, offers, as M. Paradol has asserted, no possible door of ultimate escape to the upward paths of reverence and duty—if beings whom God has created, and will continue to create, unequal must for ever vainly assert that they are equal, and the laws of nature and society thus necessarily and permanently conflict, then the fate of France, and more remotely of all other nations, as self-governing bodies, is sealed. On such an hypothesis, the political future of individual nations might for a time offer the dreary alternative of anarchy within, or order from without; but even for them this choice would vanish with the gradual triumph of "The Revolution"; and no temporal order from without even could come to the aid of the world as a whole. By such a theory democratic despotism—the Napoleons of the future—even Hobbes's Leviathan himself—are shut out. Order, liberty, and civilisation are impossible.

But, as M. Paradol himself has acutely remarked—*Tout est imparfait et incomplet en ce monde, même le mal*. A democratic society is an evil the realisation of which has been denied to man, not by circumstances which he controls, but by nature, which controls him. There never was a democratic society in this world, and we may rest assured that there never will be one—at least so long as this world is peopled by men. In France, the advent of liberty has been grievously retarded by the disorder which the search for it has occasioned; but the fact of its unattainability is a guarantee to us—and for the present, I fear, the only guarantee—that the attainment of liberty is not utterly to be despaired of even in France.

But it was not with a view to the appreciation of schemes of national organisation, either social or political, that I desired for the present to urge the duty of endeavouring to read the marvellous page which contemporary history is unrolling before our eyes. Internal politics bear on external politics indeed very extensively. Inasmuch as no house is firmer than its foundation, and no structure is stronger than its weakest part, *jus inter gentes* necessarily

rests on the *jus gentis*. Practically, the problems which they present are insoluble apart; but they admit of being separately considered, and whilst in the case of separate nations direct interference is forbidden, there is a common nation—a nation greater than France or England—a confederation wider than that even of the Teutonic race—of which we are natural-born citizens, the citizenship of which we can never renounce, and the affairs of which, as students of international law, it is our special business to discuss.

That this great community of mankind—this ultimate human family—has hitherto defied all attempts at organisation, is a fact the reality of which has been brought home to all men's minds by the outbreak of this fearful conflagration, and the constant necessity of recognising which gives to our study of the laws of peace and war a painful character of unreality that does not belong to the study of any other department of positive law. The problem of international organisation, insoluble as it has hitherto proved to be, is never absent from speculative minds. During the intervals of peace, practical men, even when engaged in diplomatic occupations, are for the most part pretty successful in banishing it from their thoughts; but no sooner does war break out than it obtrudes itself on their attention; and the moment that a war terminates they find themselves compelled to attempt its solution, generally no better and sometimes worse off for guiding principles of action than their predecessors had been on previous occasions.

That such was the position of the negotiators of the Treaty of Vienna in 1815 admits, I imagine, of little question; and that their work has proved to be the most egregious failure that disfigures the international statute-book is a fact, at any rate, about which there is no question at all. Now, though I can scarcely hope that diplomatists will be able to offer any serious contribution of a positive kind to the better accomplishment of this great work on the occasion which is again drawing near, there is a very important negative contribution to it which a careful consideration of historical phenomena, more especially during the last few years, would, I believe, enable them to supply.

There are two principles which have contended for the mastery in every practical negotiation, and which every theoretical scheme has attempted to reconcile, the falsehood of both of which I think they might now hold to have been finally demonstrated. If these could be eliminated from the approaching discussions, the problem of international organisation, though still surrounded with great and possibly insuperable difficulties, would present itself to the diplomatic mind in a very much more manageable form than hitherto.

The first of these principles is *finality*, which is supposed to impose on schemes of international organisation the necessity of setting final limits to national development and decay by the establishment of permanent international relations—or, in other words, by the maintenance of what is technically called the *status quo*. The second principle is the *absolute equality of rights and of obligations amongst independent nations*—a principle which is supposed to involve the necessity of assigning, or affecting to assign, equal votes to all the members of the family of nations not absolutely excluded from the Council Board, however widely they may differ in real importance and power.

[The action is then traced of these principles in international politics from the time—now more than two centuries ago—when the old dream of a universal Empire, divinely instituted and divinely upheld—the dream of Dante and the mediæval publicists—was abandoned, and men began to speculate on the possibility of substituting for it a European Confederation, which should be self-governing and self-supporting.¹]

The history of this period is pregnant with lessons of warning. It tells us,—and I think the teaching of all history (of the history of this autumn most emphatically) is to the same effect—that the power and importance of separate communities, not only absolutely, but what is far more important for our purpose, relatively to each other, has been continually changing, and consequently that what we ought to have provided for was the organisation, not of a stable body, all the members of which possessed and retained definite and specific functions, but of a body in perpetual flux, the members of which were changing and would continue to change their functions, their rights, and their responsibilities, relatively to each other and to the whole.

The question now is whether it is possible to shadow forth a European or cosmopolitan constitution, self-sustaining and self-vindicating, which, by taking cognisance of existing diversities of power, shall make provision for legitimate progress and righteous development, and for actual decadence and relative retrogression? I concur in the latest opinion of Kant—an opinion in which he was partially anticipated by Grotius, and in the direction of which men's minds generally seem now to be turning—to the effect that it is to the creation, not of a Confederation, in any sense of the word with which we are as yet familiar, but of a permanent congress of nations, or international parliament, that we must direct our endeavours. Such a congress, I think, would satisfy the great desideratum of a self-vindicating international legislature and executive, if it were constituted on something like the following scheme:—

¹ This portion of the lecture was not fully reported.

1. That its meetings should be annual, taking place in the autumn, between the sessions of the various national assemblies, and this totally irrespective of the existence either of peace or war.

2. That the places of meeting should be Belgium and Switzerland alternately, or one of the Swiss Cantons—say Geneva—set apart as neutral European ground.

3. That each State should be represented by two deputies, both of whom should be present at the meetings of the Congress, but one of whom only should be entitled to speak and vote. This is a proposal of Bentham's, in which, I think, there is much good sense.

4. That each State should be entitled to vote in proportion to its real power and importance for the time being.

5. That, in order to fix this proportion, it should be the first, and often, it is to be hoped, would be the only, business of each Congress to ascertain the relative importance of each State on the basis—(a) Of population; (b) Of free revenue; (c) Of exports and imports.

6. That each State be entitled to propose and push to a vote any question of international politics in which it might be interested.

7. That each State be bound to supply a contingent of men or money, proportioned to the number of votes assigned to it, for the purpose of enforcing the decrees of the Congress by arms if necessary.

8. That the representatives of any State which should make war without the sanction of the Congress be excluded from its next meeting; and that the conduct of such State be judged of in the absence of its own representatives, but only on a written statement and an oral hearing of its counsel by the representatives of the other States.

9. That all purely national questions be excluded from the deliberations of the Congress; but that the Congress itself should determine whether any question brought before it was, or was not, of this kind.

10. That civil wars, as opposed to rebellions, be within the jurisdiction of the Congress, the Congress itself being entitled to judge what internal commotions amount to civil war.

11. That all questions brought by individual States before the Congress be submitted to it by the representatives of such States—first *scripto*, and then *viva voce*.

12. That a judicial tribunal be constituted, to the decision of which it should be competent for the Congress to remit any matter which it conceived to demand judicial determination.

13. That there should be a final appeal from this tribunal to the Congress itself, in a manner analogous to that in which the judgments of our Supreme Courts may be carried to the House of Lords.

14. That the judges of this Court be appointed by the Congress, each State voting in proportion to its real weight, ascertained as above.

15. That the Presidents both of the Congress itself and of the Judicial Tribunal be appointed, or reappointed, at each meeting of the Congress; the ordinary Judges of the Tribunal holding their offices *ad vitam aut culpam*.

16. That the Presidents and the Judges, being officers of the Congress, be paid by the Congress, *and paid very highly*, so highly as to secure the best judicial ability in the world; but that the representatives receive no remuneration, except such as should be granted them by their respective States.

17. That the expenses of the Congress be defrayed by an international tax to be fixed by the Congress. That the said tax be proportioned to the number of votes enjoyed for the previous year by each State, and be levied by the several States on their own inhabitants.

Many provisions of a more special kind would of course suggest themselves were the scheme to assume a practical shape, but the preceding, I think, will sufficiently indicate my conception of its general character. You will gather from the care with which I have made provision for the forcible execution of the decrees of the Congress, that I am not of the number of those who cherish very sanguine expectations of the possibility of finally and totally abolishing war. Bad as war is, we must never forget that it is a secondary evil to injustice. We must be "first pure and then peaceable"; and it is only when an efficient substitute can be found for war that its abolition can be rationally or righteously desired. But the moment that this can be effected, war becomes a crime of the first magnitude; and surely the decisions of a body which should take cognisance of the real power and importance of its various members would have a very much better chance of being accepted in lieu of the verdict of battle, than those of a body of which all the members voted equally. The chances would then be many that individual States would gain no more by fighting than by voting, and to assume that in such circumstances—with the full knowledge of the probable consequences of war—they would prefer to vote, is surely to credit them with no very wonderful measure either of humanity or of wisdom.

V.

(2)

THE FRANCO-GERMAN WAR.

PATERNITY AND FRATERNITY.

Concluding Lecture delivered to the CLASS OF PUBLIC LAW,
Session 1870-71.

(From the *Scotsman* of 21st March 1871.)

WHEN we met in November, I said to you that the duty incumbent on every intelligent man of endeavouring to understand the life of his time seemed to me to lie peculiarly at the door of the student of public law. From the very able essays which I have received, I rejoice to see how fully you have recognised this duty; and I feel that I should scarcely be acting up to the spirit of my own remark if, before we part, I did not invite you to consider along with me one or two of the principles which the extraordinary period through which we have lived during these five months has brought into more prominent light.

The verdict of battle, which even in November seemed irrevocable, has not been reversed, either by the desultory war in the provinces, or by the heroic defence of Paris. Germany has conquered; France has accepted her defeat; and the hegemony of Europe—the leadership of the human race—for that, in truth, was the lofty prize for which these gigantic combatants fought—has passed for a series of years, perhaps permanently, in so far as this word is applicable to human affairs, into German hands.

That this change of leadership means a new order of ideas, and consequently a different line of march from that which the European nations, under French guidance, have been following during the last seventy or eighty years, is obvious; and it is not wonderful that those whose conceptions of progress have not transcended the realisation of the ideas of the Revolution of 1789 should look forward to the future with alarm. For my own part, on the contrary, I am filled with hope; for it seems to me that, without relinquishing anything that was true in the principles of that great political upheaval, we have now the prospect of being delivered from much that was false in them; and that, resting on more catholic conceptions of human relations than were then

inaugurated, we may now look forward to a steadier progress in the direction of liberty than we have hitherto known.

In order to justify this hope, permit me to call your attention to what I think I may single out as the two central ideas which have been opposed to each other in the recent struggle. In the study of these ideas, if I am not greatly mistaken, and not in any subsidiary considerations as to individual conduct and ability, you will find the real explanation of the marvellous triumph and of the still more marvellous collapse. The most fruitful principle of the French Revolution, the object of its propagandism, and that in virtue of which we ourselves in recent years have come more and more under its sway, was the principle of *Fraternity*. It was not a new principle, or a principle that was peculiar to the French Revolution. On the contrary, it has been the principle of every victorious revolution, of every revolution which marked a real step in advance in human affairs. Buddha, as we have seen, proclaimed it in India; Socrates taught it, and the Stoics worked it out, into some even of its international applications, in the classical world. Its wider and deeper conception was one of the chief objects of Christian teaching; and the religious reformation in Germany and the political reformation in Holland, in England, and finally in America, had enforced it with an emphasis which had been felt even in Catholic and despotic countries.

Still the impassable boundary-lines which separated man from man, and converted Class into Caste, continually reappeared; and the terrible shock of the Revolution was needed for the final vindication of that *solidarité* by which it is now admitted that human interests are bound together. The idea of fraternity, then, in the strength of which the hosts of France went forth to battle, was a true and a great idea. But it encountered an idea that was truer and greater still—the idea of *Paternity*. The idea of paternity is the leading idea in the mind of a German. First and last, highest and deepest, of all his thoughts, is that of his Father in Heaven. His creed is not very orthodox, according to our notions of orthodoxy. He is apt to be theoretical and rationalistic, even on points which we regard as essential; and about Patron-Saints and Ladies-of-Victory, to whom the poor Parisians addressed their sentimental prayers, if he is a Protestant at all events, he gives himself no concern. But he believes that he is ever in the presence of Him who made him, that His support will never fail him—and this belief is strong, and real, and active. Then there is the Father Land, and Father Rhine, and Father Wilhelm—for though he is under no delusion as to personal gifts, and cherishes no fantastic notions about divine right, he clings to the idea of monarchy as the emblem of Paternity. The humblest

citizen regards the head of the State as his father, and the head of the State reciprocates the sentiment by addressing him as his child.

This conception of paternal and filial relationship pervades the whole organic life of Germany, both civil and military. The superior stands to the inferior in the relation of a father, not of a master; and the inferior is not his servant, but his child. Now, men were parents and children before they were brothers and sisters; and we have only to look at the separate family to be convinced of the greater strength of the vertical than of the lateral tie. So long as the father, or even the mother survives, the family retains its integrity: The parental bond holds it together, even after its members have quitted the shelter of the parental roof, and struck separate and self-supporting roots. But the moment the parental tie is loosened, and the family united only by fraternal bands, the process of disintegration commences; and it soon becomes apparent that, if the family is not to lose itself altogether in the surrounding community, it will be by resorting to some artificial means of preserving the influence of the paternal principle. Hence clannishness, family-names, primogeniture, armorial bearings, heir-looms, roof-trees, and even in a great measure the passion for landed, as opposed to moveable, property.

Now, the family, in this as in so many other respects, is a micropolis; and a State that professes to be organised on the principle of fraternity is a mere rope of sand compared with one that is held together by the loftier and more powerful bond of paternity. From the one the duty of obedience may almost be said to be theoretically excluded; and its practical recognition, from motives of expediency or necessity, will always be partial and intermittent. In such a State discipline is a mere exotic. Of the other, reverence is the central thought, obedience is the condition of its existence, discipline is a natural, indigenous production.

The phenomenon which we have been witnessing during the last few months has been neither more nor less than the collision of two bodies-politic thus unequally constituted; and if you reflect on this fact for a moment, I think the total disorganisation of the one, and the more consistent organisation of the other, which has resulted from the shock, will cease to surprise you so very greatly. Whether the dangers to liberty inherent in patriarchal monarchy have as yet been met in Germany by adequate constitutional checks is a subject on which I cannot enter at present. But there is a kindred subject on which I should like to say a couple of words. We have heard a good deal of the exclusive character of the German noblesse, and of the social and political evils likely to result from the remains of feudalism which still linger in the land. I confess that it is in this direction that I myself appre-

hend, not ultimate miscarriage indeed, but it may be serious inconvenience, and that possibly at no distant date. The tendency to separate classes by lines of artificial demarcation is the complementary error to that of obliterating the natural lines by which they are distinguished; and the one error inevitably leads to the other. Unless the noble class in Germany will voluntarily open its ranks, it requires no prophet to foretell that the barriers within which it has intrenched itself will be broken down, and that the chivalrous qualities on which it values itself so highly, and which in the recent crisis have been so precious, will be lost to the land.

A limited monarchy and an open nobility are alone possible in our day. But the fiery ordeal to which these two great nations have just subjected each other has abundantly demonstrated the greater strength and consistency of an over-organised, and in some respects no doubt falsely-organised society, than of one that was destitute of organisation altogether. When the struggle commenced, France, it is true, was, in name, what Germany has become. But the French Empire was an anomaly, an inconsequence, a mere tatter of the grand old robe of paternity under which a democratic society, for the moment, had sheltered itself from the bitter blasts of anarchy. No sooner was it exposed to the strain of misfortune than it rent asunder and was trodden under foot, those who had sworn to defend it vying with each other in doing it dishonour. A society constituted on the paternal principle offers many a harbour of refuge. Had the fortune of war forsaken Germany, as in 1806, internal discord would scarcely have been added to external disaster; and another Leipzig might have atoned for another Jena. In France, on the contrary, wretched though the Empire was, the Empire was everything. When the Cæsar fell, there was no other king or father—no other emblem of unity or power—around which men could rally. All men were brothers, no doubt; but it soon appeared that the thoughts of the younger brothers were not to defend the common hearth, but to pull their elder brothers down to their own level. And hence the glory of the whole of them was turned into shame.

The lesson is a terrible one, which, I trust, the men of your generation will lay to heart. As regards the future of France, I dare not even hazard a conjecture; but as it is the Romanic nations that as yet have been the chief sufferers from the false doctrines of the revolution, I trust that it may not be too late for our own mixed race to revive those paternal and filial sentiments and traditions to which, duly tempered by a regard for emergent interests, we owe our internal tranquillity, and which hitherto have strengthened us to "speak with our enemies in the gate."

VI.

MONARCHY, REPUBLICANISM, AND DEMOCRACY.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1871.

(Reprinted from the *Journal of Jurisprudence*.)

IT has been my custom to spend the first hour of our coming together, when your attention could not well be concentrated on more special subjects of study, in discussing, in a popular manner, what seemed to be the leading public question, or public event, of the day. The practice is one to which I shall probably adhere, because in addition to awakening a speculative interest in the studies on which you are about to enter, it has the further advantage of reminding you that these studies bring you to the very threshold of practical life.

For several reasons, the subjects which I have hitherto selected for this purpose have been, almost exclusively, of external interest. The period during which I have occupied this chair has been peculiarly rich in external events. In addition to many minor occurrences which, in other times, would have appeared to us of first-rate importance—such, for example, as the Danish war—it has embraced the concluding portion of the great American civil war, the epoch-making seven-weeks' campaign of 1866, and finally, the Franco-Prussian contest for European supremacy. That I should speak of such absorbing topics was inevitable. Then eschewing, as I do, the very appearance of party leanings, I judged it more convenient that any opinions which I might entertain on questions of internal politics should be gathered as inferences from the principles which I ultimately enunciated, than that they should be expressed in words which might possibly mislead those who knew me as little as you do at present.

But there are questions which are both of external and internal interest, which affect us not only as members of the great brotherhood of nations, but as an individual nation, and as individual men—nay, which, from the peculiar conditions of the society in which we live, may come to affect us more specially and more deeply than almost any of our neighbours. When questions of

this class assume the ascendant, when they are in all men's mouths and in all men's thoughts, when you cannot look at a newspaper without coming in contact with them, when they have invaded the workshop, and threaten to shake the very foundations of society, they cannot too soon be made the subjects of your earnest study; and I cannot embrace too early an opportunity of entering upon the task of enabling you, in so far as I may be able, to bring them to the tests of Reason and of Nature. Now, it is needless to conceal from ourselves the fact that that vast category of social, political, and economical questions which group themselves around the words "Monarchy, Republicanism, and Democracy" have already assumed this character, and are asserting it more emphatically every day that we live.

In saying this, I am far from wishing to insinuate that there is, at this moment, any wide-spread feeling of dissatisfaction, or deeply seated passion for political change, in this country. On the contrary, I believe that there never was a more general feeling of contentment. For the last eighteen months, more especially, the hearts of all rational men and women have been overflowing with thankfulness for the exceptional blessings of peace and tranquillity which we have continued to enjoy, and which, in so large a measure, we owe to the venerable institutions under which we live. The great personal virtues, together with the judicious and dispassionate character of our Queen, have singularly endeared her to her subjects; and from the preference which she has exhibited for this portion of her realm, she has come to be regarded by us as a native sovereign, in a more immediate sense than any of her predecessors since the Union of the Crowns. It is scarcely possible to imagine a line of conduct more fitted to exhibit the advantages which an old, complicated, refined, and luxurious society may derive from the permanent influences which centre in a single hereditary head, than that which has been consistently pursued by Her Majesty, from her early accession to the present hour. Exposed to "that fierce light which beats upon a throne and blackens every spot," the life of royalty, in the quietest times, is one of peculiar difficulty. And yet I doubt whether there is one of us who could mention a private life, which, if it were to be lived over again, would call for fewer changes than the Queen's.

What is true of the highest person in the realm may, with no very serious deductions, be said not only of her own family and of the circle which she and her lamented husband have more immediately influenced, but of the great body of the nobility. From the tendency which has been exhibited to reduce the legislative functions of the House of Lords to mere formalities, it is not

surprising that the more active spirits among its younger members have come to regard them with some degree of indifference, and have occasionally preferred the excitements of the chase or of the racecourse to what their fathers regarded as their "Parliamentary duties." There is nothing so dull as meaningless routine; there is nothing so depressing as compulsory inactivity; and it is true, I fancy, that the House of Lords, as a whole, has experienced a certain degree of relaxation from these enervating influences. But it is our want of trust in them, more than anything they have either done or neglected, which is rendering the Peers untrustworthy; and which, to many, seems now to call for the external reinforcement of their ranks. One trembles to think that the time may come when the custom which is creeping upon us of sending up the members of the House of Commons pledged to the course they are to pursue, and the votes that they are to give, on all the leading questions of the day, by degrading them from the position of representatives to that of delegates, may produce corresponding effects on the lower branch of the legislature. When we bear these unfavourable influences in mind, and reflect on the exceeding corruption and immorality which has commonly taken hold of an idle aristocracy, we cannot but marvel at the manly and self-denying zeal for the public service exhibited in this country by the richest aristocracy the world ever saw. Nor is the better and more generous portion of the nation insensible to this fact. On the contrary, so strong and general is the feeling of gratitude to this class of persons, for the unrequited sacrifices which they incur in the performance of duties for which leisure, education, and knowledge of the world have given them a special aptitude, that there is, I believe, only a very small minority of envious and ill-conditioned persons who desire any great or immediate change in their position.

Still it cannot be doubted that there are many, to whom it would be in the last degree uncharitable to apply such epithets as these, who hold the opinion that republicanism is a better form of government than constitutional monarchy, and who regard republicanism as synonymous with democracy, by which they mean a more or less immediate levelling down of all distinctions, social and political, and an entire equalisation of external means.

In proceeding to consider this opinion, let me first call your attention to the two separate propositions which it couples together, because it is the mixing up of these two propositions, more than anything else, which has involved modern politics in confusion. The first proposition—that republicanism is preferable to monarchy—raises for discussion what may fairly be regarded as an open question; but it is a question that is open

only because it admits of being separated from the second proposition which affirms the necessary identification of republicanism with democracy.¹ So long as we keep within the bounds of nature, there is no form of government which is either right or wrong *on principle*. Up to this point, all political questions are questions of expediency. "The form that's best administered," that is to say, which admits of being made the vehicle of the highest freedom to the whole community—for that is the ultimate end of all forms—"is best." Now there is, as it seems to me, no violation of nature's laws necessarily implied in a form of government which ignores the hereditary principle, either as regards the head of the State, or the other branches of the legislature; and that was all that was meant by republicanism, either by the ancient publicists or by the speculative politicians of our own Commonwealth. The existence of an organic society, in which all the relations, and consequent distinctions, which nature has established between its respective members, and all the natural consequences of these relations and distinctions, shall be fully recognised, is perfectly conceivable under an elective president or presidents, and under a chamber or chambers similarly chosen; and this either for life or any shorter period that may be found most convenient. Any preference, then, which I may have for constitutional monarchy, in the present circumstances either of this country or of any other, no more entitles me, as a scientific jurist, to condemn republicanism than a similar preference for Episcopalianism would entitle me, as a theologian, to condemn Presbyterianism, so long as I am unable to show Holy Writ either for or against either of them. Nature is the Bible of the politician, in the only sense in which we can speak of politics here; and where nature is silent we are still in the region of expediency, and not of principle. I consequently never can understand what men mean when they tell me that they are Monarchists or Republicans *on principle*.

Even in dealing with questions of expediency, there is, no doubt, always one right solution, and one only. Here, as everywhere else, though error be multiform, truth is one. But even supposing this one right solution to have been arrived at, it is a solution the truth of which is not necessary and permanent, but accidental and contingent, for the simple reason that it is conditioned by time, and place, and race, and historical tradition, and custom, and I know not how many more of what we call circumstances. What is good for my race or my nation may be bad for another race or another nation; and what is good for my race

¹ *La République ou la Démocratie, identifiées l'une à l'autre par l'idée moderne.* Emile Acollas. *La République*, p. 52.

and nation at one time may be bad for them at another. All that we can say is, that the nearer we come to the same causes, the greater will be the probability of the same effects. For example—republics have hitherto been found to be most realisable in very small communities, and in new and thinly-peopled countries. The reasons are obvious. In a small country—one of the old Hanseatic towns or smaller Swiss cantons we shall say—the personal qualities of every individual are known to every other individual, just as they are in a family; and the best men—the most intelligent and experienced—come to the front with scarcely any artificial organisation at all; whereas, in large communities, such men are apt to withdraw from the rude struggles and mean intrigues of parties, or to have their voices drowned by mere vulgar bellowing. Permanent arrangements for giving prominence to men of cultivation at all events, if not of ability, become matters of far higher importance in the latter case than in the former. Again, new and thinly-peopled countries, “where whosoever has four willing limbs finds food under his feet and an infinite sky over his head, can,” as Mr. Carlyle has said, “do without governing.” They scarcely have any hereditarily cultivated class to whose leisure the public may lay claim. In them, therefore, when independent, republicanism is almost the necessary form of government, and necessity is the safest of all guides to what is natural, and—as natural—right. Of all countries in the world, in so far as the previous experience of mankind goes, the two countries least suited for republican government are probably France and England. Even as regards them, however, all that one can say is, that republicanism is condemned by history and experience. But it is not condemned by nature; and consequently its success, though in the last degree unlikely, is not impossible.

As regards democracy, however, meaning thereby a form of government and of social life in which there shall be no distinction whatever between man and man, either inherited or acquired, where there shall be neither rich nor poor, high nor low, but where all shall be equal and each shall be independent—the case is different. That is a form of existence the realisation of which is not difficult or improbable, but *impossible*; and this not now or here, but *always and everywhere*. The ordinary relations and distinctions of social existence, of which political relations and distinctions are merely the reflex, result from, and rest upon, facts and laws of nature which are as permanent as those which govern the changes of the seasons, the ebb and flow of the tides, or the alternations of light and darkness. The inequalities of human fortune, which the democrat proposes to abolish, are God's work and not man's; and what God has made unequal, man *cannot*

equalise. So long as there is wisdom and folly, strength and weakness, industry and indolence, vice and virtue, there will be rich men and poor men, full men and empty men, men who are up, and men who are down. That dependence and independence are but relative terms seems to be implied in the doctrine of "Fraternity," which has always formed part of the democratic creed. Absolute dependence is shut out by the fact of separate existence; and absolute independence has been felt to be equally irreconcilable with the conditions of human existence, or indeed of existence of any kind in a universe in which all being is intertwined. But the equality of dependence and independence, which is regarded as the very essence of that doctrine, is just as unrealisable in a world in which, from the mere inequality of natural powers, there must always be some who have more to give than they need to ask, and others who must ask more than they can give. The paternal and filial relations, as I endeavoured to explain on a former occasion, not only precede the fraternal relation, but define it and modify it in all the forms of its manifestation.

From all this, however, it by no means follows that, in particular countries at particular times, there may not be a diversity of external conditions by which the effect of nature's law of inequality is artificially exaggerated. The familiar instances of slavery and castes, by which impassable lines of social demarcation have been established, will at once occur to you; and it must be conceded that the right of full and free activity—the one fundamental human right in which all others originate—has been interfered with at least as often by exaggerating natural inequalities as by ignoring them. Although we may dismiss democracy, then, on principle, and have done with it scientifically, as a form either of social or political existence, in a manner in which we cannot dismiss republicanism, it does not follow that we shall be justified in dismissing, along with it, all those claims for greater equalisation which, very unfortunately for their acceptance by the more cautious and rational portion of mankind, are usually associated with it. However great may be the follies and crimes to which some of these claims have led, they are not stricken throughout by the verdict of "Nonsense," which we do not hesitate to return to the demand for absolute Levelling. Even as regards property, the inquiry whether its distribution be at variance with the well-being, spiritual and material, of a particular community at a particular time, is a perfectly rational and legitimate inquiry; and should such divergence be discovered, in point of fact, whether it be in the direction of accumulation or of subdivision, its rectification by changes of the laws, either of intestate

succession or of voluntary transmission, is a perfectly legitimate object of legislation. Both the investigation, and the application of the results which the investigation may yield, will always be processes of infinite delicacy and difficulty. So difficult are they, indeed, that, considering the passions which they must evoke, I hesitate to say that they are even possible; and it is from this feeling, probably, that in some countries property has been permitted to drift into masses so enormous that, as regards its so-called owners, it has become little better than nominal, whilst in others, by yielding to the action of an opposite social tide, it has been frittered down into portions so infinitesimal as greatly to interfere with its economical, its social, and its political value. It is difficult to say whether excess of accumulation or excess of subdivision be the greater evil; but that both may become evils so great as to justify active legislative interference will be obvious if we consider them in their ultimate aspects. In politics, it is generally a poor way of arguing to put extreme instances, because they give little help towards the solution of questions which must necessarily be questions of degree. But they sometimes serve the purpose of convincing us that there are such questions; and the present is a case in which that fact, either in the one direction or in the other, is constantly forgotten. In proof, then, that almost every material object owes its value, both individual and communal, to the manner in which it is subdivided, take this instance. Suppose that, by the gatherings of many generations, and a long life of parsimony, a single individual were to succeed in adding acre to acre till he had purchased up the whole land in Scotland. The only possible effect which the acquisition, in so far as it had any reality at all, could have upon the man himself would be to bring home to him, more forcibly than to others, the maxim that—

“He that hath just enough may soundly sleep :
The o’er-come only fashes folk to keep.”

His life would resemble that of one of his own factors, with this difference, that he would be burdened with an impossible task; and this, if I mistake not, is very much the life of some of the best and most conscientious of our greater landowners, as the matter stands.

As regards the community, on the other hand, the whole added value which the sense of property unquestionably gives to the fact of bare occupation in every commodity, and very specially in land, would be lost. Then take the other alternative; suppose that Scotland were subdivided so that each inhabitant should have an equal share of it in absolute property. Is it not plain, in that case, that the whole country would become a wilderness; and

that nobody could be benefited by an arrangement by which everybody must starve? It is the same with every other commodity—with some even to a greater extent than with land. Think of an unlimited accumulation, or an equal subdivision, of books or pictures! What would be their value to any body on either alternative? And what would be the intellectual or æsthetical prospects of a community whose means of culture were thus locked up from it or destroyed? It being plain, then, that property owes its value not only to its distribution, but to its distribution in unequal portions, the question comes to be, "By what distribution will it be raised to its highest value to a given community at a given time?" We need have no fear, in determining this question, that we shall sacrifice the interests either of the individual to the community, or of the community to the individual, for that principle of *solidarité* so well known to the economist, and so often forgotten by those politicians from whose mouth we hear it oftenest, here comes into play. What is best for each is best for all, and *vice versa*. If we determine it in the interest of either we shall determine it in the interest of both. And there is another principle of infinite richness in economics, which here also admits of political application: I mean the principle of free-trade. When translated from the language of economics to that of politics, free-trade is expressed by the maxim, *Les carrières ouvertes*, or, as Mr. Carlyle has at once Anglicised and expounded it, "the tools to him that can use them." Well, then, the political and social, just like the economical, value of property, will be greatest when it is in the hands of those who can make the best use of it. The principle of our laws of distribution consequently must be neither accumulation nor subdivision, but use, or rather power of using; for power, in this sense, is the measure of the rights of the individual, and of the claims which the community has on his services. But then comes the hardest question of all, namely, "What is use?" "Man does not live by bread alone;" and it by no means follows that either the community, or the individual, suffers loss by a distribution of property which fails to raise it to its highest food-producing, or other directly material value. Even property that is devoted to purposes of amusement, from the physical and spiritual health and well-being which it communicates, may be at its maximum utility. And this is true, not only when it is in the hands of the community directly, as in the case of those people's parks which we rejoice to see springing up around all our larger towns, but when it belongs to a single proprietor. The yacht which restores the jaded energies of a great public servant by an autumn's cruise in the Mediterranean, or the flower-plot which cheers the honest

workman after his day of toil, may be more useful than if the one were carrying coals to Newcastle, or the other were covered by the walls of a neighbour's house. Such then being the diversity of uses, the only ground on which any object can safely be pronounced to be valueless is that, either from its quantity or its character, it has become a mere negation in the hands of its proprietor. If it is a positive burden to him, or actively contributes to his degradation, it counts, so far, as the opposite of property. In either case the interests of the community and those of the individual alike call for its transference to other hands. It has become a *res nullius*, or worse, and as such an object for reappropriation.

It is needless to shut our eyes to the fact, that what is called the "proletariate"—the class which neither produces nor possesses, but simply propagates—is the greatest evil of existing society, or that we in this country have our full share of it. It is the most prominent form that sin and misery have assumed amongst us—the cesspool of modern, just as slavery was the cesspool of ancient, civilisation. No price which we can pay for its removal will be too high. The poor we shall have with us always; probably because poverty is necessary for the moral discipline, alike of those who suffer it, and of those who alleviate it. But if matters were ordered even as man seems capable of ordering them, there need surely, in ordinary circumstances, be no intermediate suffering class between the self-supporting workman and the victims of imbecility, disease, and crime. The labourer is worthy of no more than his own hire. All attempts on his part to share the hire of others are attempts at robbery, under another name. But if opportunities of production be not artificially closed against him, there always will be such a hire; and if that hire be industriously earned and honestly paid, it will be such as not only to render life secure to him, but to bring enjoyment and opportunities of development within his reach. If he is excluded from these there is blame somewhere—probably with himself, but possibly also with others. Now, in endeavouring to be just to democratic claims, the question which we have to consider is whether this acknowledged greatest evil admits of being removed by a more equal distribution of property than we possess in England at present, and this without any counterbalancing loss in other directions—whether, in other words, there be a *res nullius*, an unappropriated fund of wealth, of the kind of which I have spoken, which by wise and dispassionate legislation may be so spread over the whole community as to secure the conditions of a really human existence to all its members, or to a larger portion of them than enjoy it at present? The question is one which I do not profess to answer, and which I advise no man to attempt to

answer, with the amount of information at present in our hands. It will not do to leap to hasty conclusions from the conditions of countries differing from our own so greatly as Switzerland; though valuable suggestions may no doubt be derived from such able reports as that "On the condition of the working classes in the Swiss Confederation, compared with that of the same classes in England," prepared by Mr. Gould, and recently issued by the Foreign Office. Before we can venture to approach the subject legislatively in this country, we must have statistics of our own, expressly directed upon it; amongst other things a new Domesday Book, as Lord Derby has suggested. There is one branch of the inquiry, however, which occupies much of public attention, and with reference to which, even now, one may perhaps hazard a conjecture; I mean the effect which a more equal distribution of landed property would be likely to exercise on the proletariat. If it be true that such a measure would enhance the value of landed property to the community as a whole, then by enriching the community it would unquestionably benefit the poorest portions of it. But there are reasons for believing that its influence on their condition would not be immediate, and probably never could be very great. The law of equal inheritance already obtains in moveable succession. The laws of primogeniture and entail, consequently, affect only the holders of immoveable, or real property. Now, if you will look back to a leading article which appeared in the *Scotsman* newspaper—no despicable source of information on such a subject—on the 13th of last month (Oct.), you will find that real property holds to moveable property the proportion of only one-fifth, and landed property, exclusive of house property, of only one-fourteenth. Even of this insignificant portion of the wealth of the community, a very small fraction is held, or ever is likely to be held, by the poor, or even by persons of moderate means, because it is tied up from them, not by artificial legislation, but by their own unconscious prudence. Estates not only may be purchased at their market prices by societies of working men for distribution amongst them—they have actually been so, and what was the result? Land, it was discovered, was a luxury, just like rare wines and racehorses, which are offered to poor and rich alike in open market every day. Working men would no more buy the lots of land than the racehorses, for the simple reason that, to them, they were not worth what the society had paid for them, and what it consequently was compelled to ask for them in return; but they bought houses to the number of 13,000 in Birmingham alone!

Now I cannot see how this state of affairs is to be altered by legislative measures, the effect of which, if successful, would be to

raise the value of land, and consequently its price. Indirectly, as I have said, the poor would benefit by this rise; because the community, as a whole, would be enriched. Viewed as an ordinary economical question, the proletariat is interested in the abolition of laws which diminish the value of land, if such laws there be. But the direct and obvious effect of the diminution of overgrown fortunes, to which the abolition of these laws might possibly lead, would be to increase the numbers and strengthen the hands of the highest and wealthiest classes, for it is the very rich and not the very poor who are the personal victims of inordinate and objectless accumulation. It is the younger sons and daughters of our great families whose activity is crippled by being deprived, by the laws of primogeniture and entail, of their share of their paternal acres, and not those to whom the food which grows on these acres is sold at nearly as cheap a rate as it is ever likely to be. When we look at it in this light we have no difficulty in seeing that the question of the redistribution of landed property, though, as I have said, quite a legitimate question for investigation, and very possibly for legislation, is scarcely a poor man's question at all. The waste of property from over-accumulation is waste of a kind which he is the last to feel; and I consequently believe that the means of immediately and extensively assuaging his lot must be looked for in altogether different directions. We cannot fix prices for commodities below their market value, for that plainly would be to rob the producer and check production. We cannot regulate the price of labour, for labour is a commodity which must obey the same laws as the bread and butter of which it is the source. But we can develop our educational appliances, if need be, by an increase of that direct taxation which falls almost wholly on the wealthier classes; we can remove our workmen—or, at all events, offer them every facility for removing themselves, from the festering lanes and alleys of our great towns, and obtaining, if not "detached homesteads," at least wholesome abodes in the suburbs. These things done—not to dispense them from work, but to aid them in working, not to reverse natural laws on their behalf, but to place them in conformity with them—we must then trust for the rest to that self-help which is the ultimate resource of all classes and all individuals, and which has never yet failed men of Anglo-Saxon blood and race.

VII.

THE INSTITUTE OF INTERNATIONAL LAW FOUNDED AT GHENT.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
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PROBABLY the same causes which for so many centuries doomed the Netherlands to be the theatre of war have contributed to confer on them the proud distinction of being the cradle and the nursery of peace. Certain it is that the land of Grotius has never forgotten the traditions which cluster round his name; and equally certain that, if Belgium has remembered more of the theology of the Jesuits than we as Protestants or her own Liberals may believe to be for her good, she has remembered, alongside of it, the jurisprudence of Soto and Suarez of Granada, in which that of Grotius originated. The only periodical of real importance in the branches of study which we cultivate here issues from the press of one of her grand old provincial cities, and it was in that city that the first society of scientific jurists for the cultivation of international law was formed little more than two months ago.

In our own country and elsewhere the investigation of the physical laws of nature is conducted, both separately and in conjunction, by experts whose lives are devoted to the pursuit. In that region of inquiry science traces the chart by which art and industry are to sail, theory is laid at the root of practice, and progress is manifest and indisputable. Popular sympathy, so far from being an impediment, is there an encouragement and a stimulus. However uninstructed may be the outside public which gathers round a meeting of the British Association, however wild may be the hypotheses which are started by enthusiasts with reference to the unexplored and possibly unexplorable border-land between mind and matter, no one disputes the existence of law, and within the region of physics proper men are willing to be guided in the pursuit of law by those in whose hands scientific

labour has placed the means of its actual discovery. In chemistry, in physiology within its true limits, above all in mathematics and its applications to mechanics, engineering, and astronomy, there is no guess-work, there are no "leaps in the dark." Within the last twenty years philology has made such marvellous strides by the same careful application of means to ends as to bring prehistorical almost up to the level of historical evidence. Even of the mental sciences in the stricter sense, the same, with a difference, may be said. The soil may be more shifting, but the methods of cultivation have improved, and the tillage is left to skilled hands. Nobody approaches logic or metaphysics without at any rate affecting to inquire seriously into natural laws. It is not till we come to ethics that popular takes precedence of scientific action, that the pursuit of natural law is confessedly—nay, professedly—abandoned, and that we hear of a "principle of utility," which means, not the discovery whether by observation of results or otherwise, of rights and duties, and of the means of their realisation in special circumstances, but the enunciation of individual preferences and the gratification of ephemeral caprices. It is not till we come to politics, national or international, that we take leave of rational inquiry altogether, deny that there is even anything rational to inquire after, and complacently pass over to the guidance of passion and chance. The function of exposition, which in other branches of knowledge follows after that of investigation, here occupies the whole field. Everybody discourses, and applauds, and ridicules, from some more or less gratuitous party assumption or sectarian dogma, but nobody inquires or works; and when the period for action comes, as come it must, we find ourselves pretty much in the same condition as if the subjects had never been mentioned at all. It is then we call in despair on the science which we despised; that we invoke the guidance of its individual representatives whom we slighted. Diplomats, arbitrators, practising barristers, party politicians, and newspaper-editors, rush to the study of Heffter, and Wheaton, and Bluntschli, and Hautefeuille, and Ortolan, and Calvo, and the rest. But, alas! the oracles are not agreed, and many of their responses are little better than historical records of practices still more conflicting. No acknowledged principles have been discovered, no fixed objects have been determined by the consent of the learned; and out of a chaos of contradictory opinions, most of them partially correct, but which can be made to tell in almost any direction, men to whom the whole subject is new have to pick out some sort of rule of present action. Can it be wondered at that in such circumstances we end in passing municipal enactments of international import, and framing international treaties gravely affecting domestic well-being, very much as the apparent interests

or prevailing passions of the moment dictate? It is fortunate if we stop there, and do not tie ourselves down for the future to the observance of rules of impossible execution, the only merit of which is that for the time being they help us to a solution in circumstances in which any solution is better than none.

It was this train of thought, coupled with the pressing necessity which recent events had revealed, which, in the spring of the present year, led M. Rolin-Jaequemyns, the learned *Rédacteur-en-chef* of the *Revue de Droit International*, to determine on carrying out a scheme, which had suggested itself simultaneously to several of the most eminent of his coadjutors, for the organisation of collective activity on the part of the most prominent individual cultivators of International Jurisprudence. In March last he addressed a confidential communication to about twenty jurists, amongst whom he did me the honour to include me, suggesting "a private meeting of a limited group of men already known in the science of international law by their writings or by their acts, and belonging as much as possible to different countries." "Hitherto," he continued, "the movement towards the regularisation of international relations has manifested itself in two ways:—

"(a) By *diplomatic action*, that is to say, by the proceedings, the correspondence, the conventions, or the congresses of representatives officially accredited by certain nations.

"(b) By *individual scientific action*, that is to say, by writings having for their object to express, in a precise, methodical, and reasoned form, the whole or a part of the rules which their author considers as those which are followed, or which ought to be followed, in international relations.

"Diplomatic action originally intervened only after the termination of wars, in order to discuss and to determine the conditions of peace. At present it tends, with a good-will not always sterile, to meet requirements of a higher order. Thus we have seen it already more than once endeavour—

"1st. To trace certain general rules dictated by a spirit of humanity and justice, and going beyond the *political* necessities of the moment.

"2d. To admit into the domain of positive *international* law an increasing number of relations which till then were held to belong to *national* law.

"3d. To accomplish the arrangement of international differences by pacific arbitration.

"Individual scientific action, in a manner equally progressive, has more and more recognised the obligation which lies upon it to give a reasoned direction to public opinion by formulating rules which, as far as possible, exhibit the characteristics of certitude

and practical efficacy. Already some jurisconsults have adopted for their writings the form of veritable codes. It would seem, then, that for the science of international law we have arrived at an epoch corresponding to that of the appearance of the history of the national law of several peoples of those collections (*recueils*) due to private sources, and which have served as a transition between simple customary tradition and homologous custom or written law. But these progressive aspirations of the two grand factors of international law come in practice in collision with the gravest obstacles. Diplomacy is impeded by conflicts at least apparent between the political interests of the particular peoples who are the subjects of the law, and the collective interest of international society; individual scientific action is rendered impotent by the fact that isolated speculations or works, however great may be the merit or the reputation of the man whose name is attached to them, do not carry sufficient weight to dominate passions and triumph over prejudices. Hence the gaps which jurists and philosophers discover in international law, and which may be thus summed up: 1st. The uncertainty or silence of the law itself on many essential points; 2d. The defect of means sufficient to prevent violations of law from exhibiting themselves in practice, or to satisfy the public conscience by condemning and punishing those which have been committed. The moment does not seem to have yet arrived for filling up these gaps in a complete manner. If we cannot say that international law is entirely destitute of sanction, it certainly does not possess it in all cases, and perhaps it is condemned for a long future to possess it still very imperfectly. To those who look reality in the face, war continues to present itself as a frightful extremity, which we must apply ourselves to rendering as rare and as limited in its effects as possible, but the occurrence of which it would be chimerical and puerile to pretend altogether to avoid. The remedy consisting in the establishment, without and above individual states, of a permanent tribunal or permanent legislature, armed with the authority necessary to execute its laws or its judgments, would be, supposing it possible, as great as the evil. For if such a tribunal, or such a legislature, was so powerful as to render it impossible even to attempt to resist its decisions, a power so immense over the whole civilised world would be a danger rather than a guarantee; and if, on the contrary, the efficacy of its decisions could be combated, their practical value for the maintenance of peace would be diminished in proportion.

"Is there then nothing to be done? The object, on the contrary, which I have in view, is to call the attention of the eminent persons to whom this writing is communicated to the necessity, the possibility, and the opportunities of giving body and life,

alongside of *diplomatic action* and *individual scientific action*, to a new and third factor of international law: to *collective scientific action*."

With scarcely any exception, M. Rolin-Jaequemyns' correspondents responded favourably to this appeal. The desirableness of collective action by personal intercourse, and, if possible, by verbal communication, between the small number of persons who, in each country, are seriously and continuously engaged in the study and definition of international relations, was admitted on all hands. But the actual bodily assemblage of such persons in one place, which, wherever it was fixed, must of necessity be distant from the homes of most of them, was felt from the first to be no easy matter. Imperative demands on their time in their respective countries, it was foreseen, would retain one class of persons whose presence would have been of the utmost importance—for though, for obvious reasons, diplomatists in active service were not invited, it was by no means intended to exclude those who had acted as diplomatists, or otherwise taken a practical share in international affairs. Others, it was known, would be deterred from a long and fatiguing journey by age and infirmity and other considerations. From the first cause, mainly, none of the arbitrators at Geneva could be present, though they expressed their sympathy with and interest in the objects of the meeting. The burden of his fourscore years deprived us of the co-operation of the venerable Heffter. Blindness prevented M. C. Lucas from sharing our deliberations. The health of M. de Parieu of the French Academy did not admit of his undertaking the journey; the same cause compelled Mr. Westlake, the English editor of the *Revue*, to absent himself; and Professor von Holtzendorff was detained by the sickness of a member of his family, though the three latter gentlemen had been amongst the original projectors of the Conference. But notwithstanding all contingencies, when the day of meeting came, M. Rolin-Jaequemyns had the satisfaction of seeing ten of his coadjutors gather around him—grave, elderly gentlemen for the most part, but full of life and spirit, and eager for the work in which they were about to engage. There was Professor Bluntschli of Heidelberg, the celebrated author of the *Codified Treatise on International Law*, and of many other works, both on the Law of Nations and on Public Law; Signor Mancini, deputy of the Italian Parliament, former minister, now Professor of International Law at the University of Rome, and one of the founders of the National School of Italian Jurists, who was unanimously chosen president of the meeting; M. Carlos Calvo, formerly Minister of the Argentine Republic, and corresponding member of the Institute of France, author of a *Theoretical and Practical Treatise on Interna-*

tional Law; M. Besobrasoff, member of the Academy of St. Petersburg, author of various works on finance and social science; M. Moynier of Geneva, the well-known founder of "La Croix Rouge"; M. Asser, Professor of Law at Amsterdam, the Dutch editor of the *Revue*; M. de Laveleye of the University of Liège, etc.; and ultimately, Mr. Dudley Field of New York joined us.

I wish I could describe to you the picturesque locality and the social surroundings of a meeting which is not unlikely to be of historical interest—the noble old Hôtel de Ville in which we assembled in the morning, the hospitable dinner-tables at which we spent our evenings, the flowers which adorned them, the wines which enriched them, the gaiety which enlivened them, and the graceful *discours d'occasion*, in which our hosts, I fear, surpassed those of my eminent colleagues whose fortune it was to respond to their expressions of sympathy and interest. But I must not linger now over even Flemish feasting, which, if it surpasses English powers of enjoyment, as Leicester said of it long ago, equally exceeds my powers of description. I must tell you what we did in the morning, not what we enjoyed in the evening.

Well then:—the original proposal that we should discuss certain open questions of International Law in the first instance, and then formulate the Statutes of a Permanent Institute for the scientific cultivation of International Law, was reversed; and though we sat six hours on each of the first three days, and three hours the fourth, we were only able to accomplish the first part of our business. The result of our labours was the formation of an Institute, of the specific objects and character of which I shall best convey to you a conception by reading to you in translation the Statutes which, after much discussion, were unanimously adopted. They are not long; and, in the original at any rate, they are expressed with that clearness and precision which so happily distinguishes the language of our neighbours.

INSTITUTE OF INTERNATIONAL LAW.

*Statutes Voted by the Conference of International Lawyers at
Ghent, 10th October 1873.*

Art. 1. The Institute of International Law is an exclusively scientific association, and with no official character.

Its objects are—

- (1) To favour the progress of international law by seeking to become the organ of the legal conscience of the civilised world.
- (2) To formulate the general principles of the science, as well as the rules which result from it, and to spread the knowledge of it.

(3) To give its aid to any serious attempt at gradual and progressive codification.

(4) To endeavour to procure the official recognition of such principles as shall have been recognised as being in harmony with the requirements of modern society.

(5) To labour, within its proper sphere, whether for the maintenance of peace or for the observance of the laws of war.

(6) To examine the difficulties which may arise in the interpretation or the application of the law ; and to give, when required, legal opinions, with the grounds on which they rest, in doubtful or controverted cases.

(7) To contribute by publications, by public teaching, and by all other means, to the triumph of the principles of justice and humanity which ought to regulate international relations.

Art. 2. As a general rule there shall be one session annually. Before the termination of each session the Institute shall determine the place and the time of its next meeting.

Art. 3. The Institute shall be composed of effective members, of auxiliary members, and of honorary members. Every member of the Institute shall receive a diploma.

Art. 4. The Institute shall choose its members freely from the men of different nations who have rendered eminent services to international law, theoretical or practical.

The whole number of effective members shall not exceed fifty, but need not necessarily reach that number.

Art. 5. There shall not be assigned, by new election, to the inhabitants of the same state, or confederation of states, a proportion of places exceeding one-fifth of the total number of effective members existing at the period of that election.

Art. 6. Diplomats in active service shall not be members of the Institute.

When a member enters the active diplomatic service of a state, his right to vote shall be suspended during the period of his service.

Art. 7. The auxiliary members shall be chosen by the effective members from persons whose special acquirements may be of use to the Institute. Their number shall be unlimited, and the provisions of Article 5 shall not be applicable to them.

They shall take part in the meetings of the Institute, but only with a consultative voice.

Art. 8. The title of honorary member shall be conferred on every person, association, municipality, or other body which shall make a donation to the Institute of not less than 3000 francs (£120). The honorary members shall receive the publications of the Institute.

Art. 9. The effective members, in concert with the auxiliary members in each state, shall be entitled to organise local bodies of persons devoted to the study of the social and political sciences, in order to second the efforts of the Institute amongst their countrymen.

Art. 10. At the opening of each ordinary session, a president and two vice-presidents shall be elected, who shall enter immediately on the discharge of their functions.

Art. 11. The Institute shall name amongst its effective members a general secretary for the term of six years.

The general secretary shall be re-eligible.

He shall be charged with the preparation of the minutes of the meetings, the ordinary correspondence of the Institute, and the execution of its decisions, except in cases in which the Institute itself shall otherwise provide. He shall be keeper of the seal and the archives. His residence shall be considered the seat of the Institute. In each ordinary session he shall present a *résumé* of the recent labours of the Institute.

Art. 12. The Institute may, on the proposal of the general secretary, name one or more secretaries to aid him in the discharge of his functions, or to take his place in a case of temporary absence.

If these secretaries are not already members of the Institute, they shall on their nomination become auxiliary members.

The mandate of the secretaries expires with that of the general secretary, except in the case in which the death of the latter, or some other circumstance, renders it necessary that some one should take his place till the election of his successor.

Art. 13. The Institute shall name a treasurer for the period of three years, charged with its financial affairs and the keeping of its accounts, and also a committee, charged with the control and inspection of its expenditure and receipts.

The treasurer and the committee may be chosen from competent persons, resident near to the seat of the Institute, who are not members.

The treasurer shall present a financial report in each ordinary session.

Art. 14. As a general rule in the meetings of the Institute, votes on the subject of resolutions to be taken shall be emitted orally and after discussion.

The elections shall be made by ballot, the members present alone being admitted to vote. For the election of new members, however, absent members shall have the privilege of sending their votes in sealed notes.

Art. 15. In exceptional and special cases in which the president,

the vice-presidents, and the general secretary unanimously regard it as useful, the votes of absent members may be taken by means of correspondence.

Art. 16. When the discussion has reference to controversies between two or more states, the members of the Institute belonging to these states shall be permitted to express and develop their opinions, but must abstain from voting.

Art. 17. The Institute shall name reporters amongst its effective and auxiliary members, and shall constitute committees for the preparatory study of questions to be submitted to its deliberations. In the interval between the sessions, this prerogative shall belong to the office-bearers; and, in case of urgency, the general secretary shall himself prepare reports and conclusions.

Art. 18. The Institute shall publish an annual bulletin of its labours, and designate one or more scientific reviews to receive its public communications.

Art. 19. The expenses of the Institute shall be borne—

(1) By the regular subscriptions of its effective members.

(2) By the contributions of its honorary members.

(3) By foundations and gifts.

(4) Provision shall be made for the progressive formation of a fund, of which the interest shall suffice for the expenses of the secretary's department, of the publications of the sessions, and the other regular services of the Institute.

Art. 20. Regulations shall be prepared by a committee for the execution of the present statutes.

It shall not become final till approved by the Institute in its next session.

Art. 21. The present statutes shall be revised, in whole or in part, on the demand of six effective members.

Subsequently to the meeting at Ghent, which consisted exclusively of jurists, a meeting of a more popular character, and with a professed object more calculated to elicit public sympathy, was held at Brussels. The Brussels meeting was of American origin, and its object, as set forth in a circular issued by the committee in New York, was "the establishment of an international code, containing amongst its provisions a recognition of arbitration as the means of settling international disputes." All those who had met at Ghent, I believe, were invited; and, as the ultimate object was one with which they could not but sympathise, however inopportune they might consider its immediate prosecution, or inadequate the means by which it was sought to be attained, they named a committee of their number to represent them. I am imperfectly acquainted with what took place; but from what I have learned, I should imagine that, substantially, all that

was done was to express the good wishes of a certain number of benevolent persons for the success of those very efforts to discover and define the rights and duties of nations in which the Institute proposes to engage. Mr. Mountague Bernard, the learned Professor of International Law at Oxford, has expressed in a letter to the *Times* the feeling of those who, like himself, did not share the enthusiasm of the originators of the meeting for the immediate compilation of a code. "To those persons," he says, "it appears that a general and complete codification of international law would, at the present time, be little better than a chimera. If it were possible, it would probably not be desirable that the nations of the world should agree, by a general treaty or series of treaties, to convert into express conventional obligations the whole mass of principles and rules which they are accustomed to recognise in their relations towards one another. No other process than this can be regarded as answering (unless in a loose sense) to that which, in reference to municipal law, we call codification. These principles and rules are very well understood, and they are the basis of all international intercourse. But if any one were to attempt to reduce them all within the compass of express definitions, and embody them in an annex to a treaty, he would find himself engaged in a very formidable undertaking. . . . With respect to arbitration, the opinion which I hold, and in which Dr. Bluntschli agreed with me, is that it is an expedient of the highest value for terminating international controversies; but it is not applicable to all cases, or under all circumstances; and the cases and circumstances to which it is not applicable do not admit of precise definition. Arbitration, therefore, must of necessity be voluntary; and though it may sometimes be a moral duty to resort to it, it cannot be commanded in any form by what is called the positive law of nations." To these views, substantially, I subscribe. Codification is an expression to which several meanings may be attached; but if it is used in any other and higher sense than that attached to it in the works of Professor Bluntschli and Mr. Dudley Field, it must be preceded, 1st, by agreement as to what the relations, that is to say the rights and duties, of separate nations actually *are*, and consequently what the law of nations *ought to be*—in other words, by the *scientific solution* of the problems which it presents; and, 2d, by the consent of separate nations, or some of them, to accept the law of nations as thus enunciated—in other words, by the *political solution* of the problems which it presents. When we know what we ought to do, and are ready to do, we shall have something to codify. Apart from these conditions we should probably be codifying error; and, even if we codified truth, we should be codifying it in vain. We should be giving the name of a code to what was merely

a publication of scientific discoveries and benevolent aspirations—a publication not useless perhaps, but wholly differing in its action from what is called a code in municipal law. Arbitration, too, is understood in several senses; but in any other sense than that of a voluntary arrangement between individual States, it presupposes international organisation of such a kind as to render possible the establishment of an international tribunal competent to enforce its own decrees. Such a consummation I do not regard as impossible; but we are far removed from it as yet. If we ever attain to it, it will probably be by the action of those mysterious social forces which time and reason sometimes call into being to the astonishment of mankind. And the existence of these forces would probably supersede the necessity of their exercise. To suppose that separate nations should become reasonable enough to institute such a tribunal is perhaps equivalent—it may be more than equivalent—to supposing that they should become reasonable enough to do without it. We never became reasonable enough to institute a “tribunal of honour,” but we have become reasonable enough, in this country at least, to get rid of duelling by the action of social opinion alone. In like manner, the spirit of litigation has diminished to a far greater extent than the dispensation of justice has improved. Though we do not know how to get rid of war, perhaps we shall get rid of it some day without knowing how.

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VIII.

THE "THREE RULES OF WASHINGTON" VIEWED IN THEIR RELATION TO INTERNATIONAL ARBITRATION.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1874.

(Reprinted from the *Journal of Jurisprudence*.)

IN a paper which, as a member of the second *commission d'étude* appointed by the Institute of International Law in September 1873, I presented to the Conference at Geneva in September last, I stated pretty fully the opinion which, after much consideration, I had formed of the famous "Three Rules of Washington."¹

As that paper has been printed by the Institute, both in English and in French, I hope to have the pleasure of presenting copies of it to you in the course of the session; and I recur to the subject at present only for the purpose of rendering intelligible what I wish to say to you on the subject of International Arbitration.

When I tell you that I objected to these rules not only in their details but on principle, you will not be surprised to learn that my views met with little acceptance at Geneva; and when I add that my objections not only applied to the rules themselves, but extended to the Foreign Enlistment Acts, both English and American, to which the rules gave partial recognition by treaty, I shall not be surprised if the misapprehensions with reference to the bearing of my views on the subject of arbitration, which I cannot but think influenced the minds of my learned colleagues, should show themselves amongst you. The Rules of Washington, and the conceptions of foreign policy on which they rest, have got so bound up in men's minds with all modern schemes and expedients for averting and circumscribing the horrors of war, that he who ventures to raise his voice against them runs the risk of being looked upon as little better than an incendiary who seeks to spread a conflagration which better men are striving to extinguish. The advocate of a

¹ The substance of this paper will be found in Lorimer's *Institutes of the Law of Nations*, vol. ii. Book iv.

doctrine which exposes him, however unjustly, to such an imputation can look for little sympathy from philanthropists, and I almost doubt whether my friends of the Peace Society, who used to think rather well of me, would now be disposed to admit me into their ranks. And yet, I firmly believe that both the philanthropists and the Peace Society would be wrong in this, as in a good many other matters I could mention; for it is in pursuance of their own objects and in accordance with their own principles, if they understood them rightly,—by which I mean, of course, if they understood them as I understand them,—that I object both to the Rules of Washington and to the Foreign Enlistment Acts. I object to these so-called pacific arrangements, in the name of peace; I object to these so-called progressive arrangements, in the name of progress; and I object to these so-called neutral arrangements, in the name of neutrality. Their primary principle—that of preventing intervention, both public and private, in every form, and leaving the belligerents to tear each other to pieces in isolation, with such weapons as they chance to have at hand, or have had the foresight to provide in anticipation of the war—I regard as unsound from an international, as Lord Palmerston regarded it as unsound from a national, point of view, in all circumstances in which the impotence of friendly States does not render it inevitable.¹ In the exceptional circumstances in which it is inevitable, I regard the secondary principle which these enactments call into play, the principle, namely, of burdening neutral States with engagements for the conduct of private persons which they cannot fulfil, and binding them to suspend the action of the economic laws of supply and demand which they cannot control, as equally unsound and inexpedient.

Though we talk of these rules as rules for the protection of neutrality, they are in reality belligerent rules—rules which on every occasion of their recognition have been dictated by belligerents,—or rather I ought to say by the stronger belligerent for the time being, in whose favour alone they really operate. If it were possible to act up to them and to work them out to their logical results, though their effect would be to annihilate neutral trade, they might still be defended from a neutral point of view. Peace, it might be said, is better than trade; and these rules at any rate protect the neutral state from the contagion of belligerency. However unfair they may be to the weaker belligerent, whom they cut off from the markets of the world, and consequently from the means of self-defence which still remain to him, they act as an effective quarantine on war. But it is not possible to act up to them, it is not possible to develop them, because it is not

¹ Vattel, ii. p. 194.

possible to establish the absolute isolation which their principles desiderate. The ties of sympathy and interest which bind friends and neighbours, it may be blood relatives, together, cannot be cut asunder by artificial means. "Love laughs at locksmiths;" and trade will prove stronger than any barriers you can erect against it. Sympathy and interest rest upon nature, and if in grasping at what appears to be immediate utility you pass neutrality laws which violate natural impulses and tendencies, Nature will vindicate her rights by irregular means.

"Naturam expelles furca, tamen usque recurret."

The more we attempt this impossibility, by magnifying our professions and multiplying our promises, the less we perform it. We simply increase our entanglements and add to the weight of our liabilities for failure. If we had promised less at Washington we should have paid less at Geneva; and if we had promised more—to prevent trading in contraband, for example, as is now being urged upon us,—we should have paid more. And yet there seems nothing that neutrals are not ready to promise nowadays. "Promising is the very air o' the time. . . . To promise is most courtly and fashionable," and I fear I may add there are even some in whose eyes "performance is a kind of will, or testament, which argues a great sickness in his judgment that makes it."¹

My principle, then, which I oppose to the principle of the "Three Rules," and which I venture to extend to recent municipal legislation on the subject of neutrality, is the principle of freedom of trade, the old principle of the law of nations,² and I maintain that the entanglements of neutrals, and the consequent risks of their being involved in wars, or subjected to the payment of damages to successful belligerents at their termination, increase in a direct ratio to the extent and difficulty of the obligations which they undertake.

Let us begin at the beginning. The lowest form of obligation which the state desirous of remaining at peace could undertake would be effected by—

(a) *A proclamation of neutrality by which it announced its own determination to abstain from taking part in its corporate capacity with either belligerent.* Now I scent danger even in such a proclamation as this, and I see no necessity for issuing it. No natural obligation, so far as I can see, lies upon a state which desires to abstain from a war in which it is not already involved, to say anything on the subject of that war at all. So long as the state at peace professes nothing, and makes no promises of any kind, to

¹ *Timon of Athens*, Act v. Scene 1.

² Vattel, ii. p. 197.

either belligerent, its attitude to both continues to be that of a friend; and a friend is not called upon to proclaim, at the outset, either that he will interfere or that he will not interfere in a quarrel which has arisen between two friends. If he thrusts them from him, and tells them that he can have nothing to do with either of them whilst the war lasts, he tells them in effect that he thinks them both in the wrong, and he insults and offends both of them, more or less. That such is the practical effect of the proceeding is proved by the fact that belligerents are rarely, if ever, on cordial terms with neutrals. They always regard them as less than friends. Moreover, the neutral who partially prejudices a cause of which he knows little, and anticipates the current of events, very probably fails in his duty to one belligerent, and it may even be to both, by assuming either that they are unworthy of his aid, or that it will continue to be impossible for him to afford it. Even if he does not intervene in the war, he may intervene in arranging the treaty of peace, and there have been cases recently in which intervention at that stage might, I believe, have been attended with excellent results. All that he is called upon to do at the outset is to indicate no opinion on the merits of the question at issue between them, and to express to them, in the most courteous terms, his regret that for the present he cannot aid them in solving it. His relation to them as their common friend thus remains unaltered; both continue to regard him with favour as a possible ally; and he is shut out by no obligation from such opportunities of usefulness as may open to him in future.

It may be said that such a proclamation is merely a municipal proceeding, which the state adopts for the information and guidance of its own citizens; nay, further, that the state is entitled to regulate the conduct of its citizens by passing what municipal laws it chooses, without affecting its position to the external world. But the municipal character of such a proclamation is sacrificed by the mere fact of its intimation, whereas, if it is not intimated, no international advantages can flow from it. But assume that it is not intimated, and that, technically, it thus retains its municipal character:—it is a mistake to suppose that actions, whether of a municipal executive or a municipal legislature, imply no measure of international responsibility. States always are, in point of fact, held responsible for the execution of such municipal orders, or laws, as draw international consequences after them; and to a certain extent they are justly so held responsible, because the execution of their own laws is the condition of their recognition as members of the family of states, and of their continuing to hold the *status* which they have acquired. The right to change its municipal laws at pleasure belongs unquestionably to the character of an indepen-

dent state, but the duty of enforcing them, as they exist, is an international obligation wherever they have international effects; and I never had the least sympathy with those who contended that England was not bound to enforce the Foreign Enlistment Acts on the plea that it was a municipal enactment. If we could not enforce it, the only course open to us was to repeal it, and leave foreign states to consult their interest, or supposed interest, in the altered circumstances which thence arose. We were not bound to intimate the change which we saw fit to make, in the same way as we should be bound to intimate our withdrawal from the Treaty of Washington. It was for foreign states to discover that fact for themselves; but one of the leading objects of diplomacy is to watch the domestic legislation of neighbouring states. The moment it was repealed we were free from its obligations; but up to that moment foreign states were entitled to trust to it, and to expect its enforcement at our hands. But the state at peace, as it humbly appears to me, is in the fortunate position of being entitled to rest on its oars. The question whether it is to row in the one boat or the other of the rival barques is, and continues to be, a question for the executive, for the simple reason that it is a question of peace or war. The legislature has nothing to do with it, and the executive is not bound to justify its actions or to explain its intentions to foreign nations. In constitutional countries the executive may, no doubt, be called upon by the legislature to explain its actions, or even to intimate its intentions, to the citizens of the state; and, with the rapid spread of intelligence, such explanations, when given, must have their effects abroad. They may generate hopes or excite suspicions. Still, at the worst, they constitute no obligations for the violation of which the state may be held responsible, as it may for the violation of a proclamation which it has intimated, or even of a municipal enactment which it has placed on its statute-book.

Such then, as it seems to me, are the objections to the state undertaking obligations with reference to its own conduct in its corporate capacity. But suppose it goes further, suppose it issues—
(b) A proclamation in which it promises neutrality, not only on its own part in its corporate capacity, but on the part of its citizens in their individual capacity; and that, in this proclamation, it recites a legislative enactment in which it defines neutrality in this wider sense.

The leading distinction between a promise limited to the action of the state itself, and a promise extending to the actions of private citizens, is, that the former *may* be kept, whereas the latter, to a greater or lesser extent, *must* be broken. A state, whether free or despotic, must be assumed to be able to control its own actions

and those of its officers,¹ because on any other assumption than this it ceases to be capable of forming the contract which is implied in its recognition. But the most despotic state in the world can control the actions of its citizens only to a limited extent, and the freer the state becomes the less it can control them. Free countries consequently must suffer most from extending their neutral obligations beyond the limits of their corporate action, and our own country and America, as the freest at present existing, will suffer most of all. In this simple fact, altogether irrespective of the peculiarities of their geographical position and local circumstances, we have an explanation of the opposition of interest, or supposed interest, and consequently of feeling, which unfortunately exists in this matter between this country and most of the continental states; and of the little desire which America exhibits to burden herself with further neutral obligations, notwithstanding her zeal in imposing them upon us. But, if exceptional in degree, our interests and those of America—which *as neutrals are identical*—are not exceptional in kind.² No neutral nation can bind its citizens, *in point of fact*, as it can bind itself; and every fresh responsibility which it undertakes for them has within it the seeds of a possible war.

It is on this ground that I have opposed, in the paper to which I referred, the proposal of the German government to extend the "Three Rules," so as to include the prohibition of trade in contraband of war, and that, in opposition to the principles of these rules, I have maintained that the only ultimate safety for neutrals will be found to consist in the absolute freedom of trade between the inhabitants of neutral and belligerent states. I am aware as I have already stated to you, that this contention involves the Foreign Enlistment Acts as well as the "Rules"; and that it practically amounts to a proposal that we should *reculer pour mieux sauter*,—always a difficult manœuvre. But I by no means admit that the provisions of these Acts are identical with those of the law of nations, or that their abandonment involves the abandonment

¹ France, *e.g.*, must be assumed to have been able to prevent the Prefects of the Alpes Maritimes and the Basses-Pyrénées from aiding the Carlists directly in the present Spanish war; but she could not, in point of fact, prevent private citizens from sending arms or going themselves to aid them, and by the existing law of nations she was not bound to do so.

² In reality the interests of all the continental states which are likely to occupy the position of neutrals more frequently than of belligerents, or which have sea-bords or land-frontiers beyond what they can conveniently guard, are identical with ours. To this category belong prominently Belgium, Holland, Italy, and the two Scandinavian States, all of which are in great danger of being sucked into a war the moment that a powerful belligerent becomes dissatisfied with their conduct, or desirous of using it as an apology for attacking them. On the other hand, I do not see that even powerful belligerent states, as a body, can gain anything by rules which can operate only in favour of one of them at a time.

of that law; and it is at this point that I must reluctantly dissent from the resolutions at which my learned colleagues arrived at Geneva.

The first of these resolutions sets forth that "the three rules of the Treaty of Washington of 8th May 1871 only apply the recognised principle of the law of nations, that it is the duty of a neutral state, which desires to remain at peace and in amity with the belligerents, and to enjoy the rights of neutrality, to abstain from taking any part in the war by affording military aid to one or both of the belligerents, and to take care that [*veiller à ce que*] no acts which would constitute such co-operation in the war be committed by any one within its territory."

The latter portion of this resolution does not seem to me to embody the sense in which neutrality was understood, either by the law of nations or by Professor Bluntschli,—by whom it probably was drawn up,—so lately as 1872; for, in his very able treatise on Modern International Law,¹ published in that year, he laid down that the neutral state may authorise both belligerents to levy troops on its territories, provided it favours neither of them (sec. 762), though he no doubt adds that it will do better to forbid enrolment altogether; whereas, as regards the action of individuals in their private capacity, he had previously stated (sec. 755) that "even a sovereign may serve as an officer in one of the belligerent armies without the state of which he is sovereign ceasing to be neutral." But without tying him down to propositions which possibly may have been dictated by the formerly existing relations between the smaller states of Germany, that the prohibition against enlistment by the common law of nations up to 1872 extended only to the formation of bodies of volunteers on neutral territory is abundantly established by section 758: "When individual citizens of a neutral state," he says, "without the authority of their government, and of their own initiative, enter the service of one of the belligerents, that fact does not constitute a breach of neutrality. These persons, naturally, can lay no claim to the benefits of neutrality, but are to be regarded as enemies. *The neutral state, however, ought not to suffer volunteers to assemble within its territories for the purpose of joining a belligerent power.*"

This latter phrase is added in the German edition of 1872 to the section as it appears in the French version of 1870;² but Professor Bluntschli has been careful to retain the qualification that, "if the state which did not forbid them acted in *bonâ fide*, it incurred no responsibility." The right of private enlistment by separate individuals thus remained untouched by the new con-

¹ *Das Moderne Völkerrecht.*

² *Droit International Codifié.*

suetude, and the state was not responsible "for any one within its territory." The sale of munitions of war was confessedly beyond the scope even of the Foreign Enlistment Acts themselves. The only direction, then, in which modern legislation can be said to have modified the law of nations is in introducing the "duty of preventing private persons from arming ships of war within its territories, or delivering them to one of the belligerents."¹

Now this proposition, according to Bluntschli's own showing (sec. 763, note), is no older than that against private enlistment. Nay, it is a year younger, for it was first heard of in the law of the United States of 1794, whereas Washington's proclamation of the previous year (22d April 1793) forbids enlistment.

Why, then, should the shorter consuetude have produced upon the law of nations, in the case of ships, the sale of which is expressly recognised by Vattel² as no breach of neutrality, what the longer consuetude has failed to effect in the case of enlistment? Is the one prohibition more reasonable than the other? If I may fight for a belligerent with my own hands, and with the arms which I constructed and carried into his ranks for the purpose, why should I not sell a ship to him, and allow him to carry it off at his own risk, or carry it to him without risk at all so long as it continues to be my property, and I have not otherwise forfeited my neutral rights?

I am far from denying that the law of nations may be changed by consuetude. The law of nations is a consuetudinary law, and what made it may change it. But I cannot see that the law of nations, having held to the old consuetude in other directions, can be held to have changed it in the matter of ships, merely because two nations conceived it for their interest to pass municipal enactments, or even on a special occasion to conclude a treaty regarding them. The Treaty of Washington has no doubt made an exception to the common law of nations as regards ships which binds America and this country till they shall choose to repeal it, either by mutual consent or by the one giving notice of withdrawal to the other, in time of peace; but it is surely a strong proposition to maintain that other nations are either to accept it in the meantime as part of the common law, or that England and America are bound to adhere to it, and to develop its principles so as still further to increase their own responsibilities and those of all other neutral nations. If England and America should arrive at the conclusion that an increase of responsibilities is but a multiplication of sorrows, they are as much entitled to repeal their Foreign Enlistment Acts as they were to pass them, and to

¹ *Das Moderne Völkerrecht*, § 763.

² Vol. ii. p. 197..

repudiate the Treaty of Washington as they were to negotiate it; and then all the argument from consuetude goes the other way, and the law of nations seeks its development in the old direction of freedom in place of restriction of trade and intercourse between neutrals and belligerents.

But are not the Foreign Enlistment Acts, and above all these rules, inseparable from the idea of arbitration? Was it not on the basis which they laid down that the arbitration in the *Alabama* case took place? And could there have been any arbitration if there had been no such rules? My reply to these questions is, that it was the existence of *such* rules that very nearly wrecked the vessel of arbitration altogether, and that rendered the results of the voyage so unsatisfactory that, whilst they continue in force, she is very unlikely to be launched again, by us at all events. A single moment's reflection, I think, will convince you that these rules of law, and the tribunal by which they were administered, were no more dependent on each other than any other rules of law and any other tribunal. In condemning the rules I no more condemn arbitration than in condemning the law of entail I should condemn the Court of Session. And, if they are independent of each other in practice, the rules and arbitration are in principle positively opposed; for the rules rest on the principle of non-intervention, and arbitration rests on the principle of intervention. So far from being shut out, then, from the advocacy of arbitration by my repudiation of the rules, the door to arbitration, and to every other form of international action with a view to the avoidance of war, stands logically open to me, whereas my opponents have found it necessary to climb over it by the help of the very principle which they previously decried.

These remarks, I trust, will explain to you what might otherwise seem to be the discrepancy between the position which I hold as an opponent to the further extension of neutral obligations, and even to their retention on the footing on which they have been placed by the Foreign Enlistment Acts and the Treaty of Washington, and the position which I have long held as an advocate for such international organisation as might ultimately render possible the formation of permanent and self-vindicating international institutions, both legislative and judicial. I still believe it to be in that direction alone that we can look for any means which can by possibility prove efficacious in substituting reason for force in the decision of international differences of the magnitude that have hitherto given rise to war. I shall afterwards endeavour to explain to you the grounds on which I hope that such means may not ultimately be beyond the reach of the growing intelligence and civilisation of mankind. In the mean-

time let us look at the expedient which is offered to us by the stage of intelligence and civilisation which we have reached, and try to discover within what limits we may hope that it will prove useful.

COURTS OF ARBITRATION.

The success which attended the proceedings at Geneva in 1872, under the Treaty of Washington of the previous year, has led many to imagine that all, or almost all, the objects contemplated by the advocates of permanent international institutions may be accomplished on far easier terms by the appointment of a court of arbiters to judge of each special case as it arises. To this opinion I can subscribe only very partially, and with many reservations.

1st. There is the leading objection that no means of enforcing the decrees of international courts of arbitration exist, or, so far as I see, ever can exist, independently of some form of international organisation either general or partial. It is often assumed that international arbitration stands, in this respect, on a footing of equality with municipal arbitration. But such is very far from being the case. Municipal organisation exists. Behind municipal arbitration stand the judicial and executive institutions of the state, and to the existence of these permanent institutions it owes a cogency to which, in present circumstances, nothing international corresponds. Those of you who have studied municipal law are aware that in our own law what is called a "Deed of Submission" contains a clause of registration which ordains the submission, and the decree when pronounced, to be recorded; and you also know that an extract of this record, duly certified, which either party may procure, forms a warrant to him for "diligence," i.e. for the enforcement of the decree against the other party. By this simple expedient a decree-arbitral, if resisted, can at once be rendered equivalent to a judicial decree. Even informal references in *re rustica*, or *inter rusticos* (*rustici* in this connection including merchants) found actions for implement, though they cannot, like decrees-arbitral under formal submissions, be made warrants for summary execution.

Something analogous to this arrangement, some expedient by which the decrees of an informal and, so to speak, voluntary tribunal may be converted into the decrees of a judicial tribunal, having the physical force of the executive at its back, exists in all other systems of municipal jurisprudence.¹ But to introduce such

¹ As to those existing in the Roman law and in modern systems, see *Projet de Règlement pour Tribunaux Arbitraux Internationaux*, par le Dr. Goldschmidt, presented to the Institute of International Law, p. 62, *et seq.*

provisions into the law of nations would be to use idle words, because the law of nations, as yet, has neither tribunal nor executive, nor office of registration, nor any other efficient machinery or authoritative organisation to trust to. In municipal law it is no doubt open to the parties to enter into a reference, or to decline it. No man can be compelled to arbitrate as he may be compelled to litigate. But, the reference once entered into, the option of accepting the decree or rejecting it is no longer given him. The case is very different in international law. Either party may repudiate the decree after it has been pronounced, as he may decline to carry out the treaty by which the reference was arranged. If he did so wholly without reason, he would no doubt incur the censure of international opinion,—a censure to which powerful states have often shown themselves to be somewhat callous, and which national opinion within their own borders does much to alleviate. But reasons may exist. That such an occurrence is not even improbable is proved by the fact that, had the arbitrators at Geneva pronounced a decree awarding what were called "consequential damages" against us, we ourselves were quite prepared to repudiate it, and to go to war with America, and should have done so with the approval of Europe. A corresponding course was equally open to America, when these damages were refused by the arbitrators on the ground that they did not fall under the treaty. Either party might have insisted on his own interpretation of the treaty. To a certain extent this objection would have been obviated had the power of interpreting the treaty without appeal been included in the submission. Still the acceptance by either party of the sense put upon it by the arbitrators, like the acceptance of the final decree itself, would have depended solely on the party's good faith; of physical compulsitor—*vi et armis*—except by the arms of the opposite party, there was and could have been none.

The partial expedients for giving validity to international decrees-arbitral, suggested by our most distinguished jurists—Bluntschli, Goldschmidt, Calvo, and others—all break down before this supreme difficulty. It is vain to define and limit the grounds of appeal¹ whilst it is in the power of the parties to construe them and extend them at pleasure; it is vain to suggest recourse to the supreme court of the state in which the arbitration took place whilst the court has no power of execution beyond the limits of its local jurisdiction. Even a special and permanent international tribunal of appeal, or *Cour de Cassation internationale*, without a corresponding executive, could serve at most only as a means of calling in more effectually the force of "opinion"; and

¹ Goldschmidt, *ut sup.* p. 56.

opinion in all probability would go over to the winning side, which might very well chance to be that of the party which resisted the decree.

2d. But apart from this fatal specialty, the limited sphere of operation to which it must always be confined renders arbitration a very partial substitute either for judicial action or for war in international relations; for

(a) Arbitration is a contract by which two parties agree to abide by the decision of a third. Arbitration consequently is possible only between two parties, *both* of whom possess rational and, as such, consenting will. A totally unreasonable or unscientific person may be called into a court of justice, and made a party to a suit, but he cannot be made a party to an arbitration. By calling in the aid of a curator, the judge can dispense even with sanity, whereas the arbiter demands both sense and knowledge. This cuts off arbitration as a means of settling disputes between civilised nations and barbarians. Barbarians could not appoint arbitrators to whose decision civilised nations could trust, nor could civilised nations trust to the acceptance of their decision by barbarians. If opinion, moreover, be but a slender compulsitor in the case of civilised men, in the case of barbarians it is no compulsitor at all. Arbitration is a proceeding which makes very high claims on the intellectual and moral qualities of the parties as well as of the judges. It consequently is applicable only between civilised nations, and between nations probably of a somewhat dispassionate temperament. If the conduct of civilised nations to barbarians be unjust, it is an injustice which may sometimes be prevented by the condemnation of civilised opinion, and in extreme cases even by armed intervention, as in the case of the slave-trade, but it can never be prevented by arbitration.

(b) There are internal as well as external barbarians with whom civilised men cannot arbitrate. Arbitration between the government of Versailles and the Parisian *Commune*, identified as it was with the Red-Republic, would have been just as much out of place as between the Ashantees and us, or between a criminal and the public prosecutor.

(c) Arbitration is inapplicable where the question at issue has reference to the existence of the state, or its relative position amongst other states. Law must correspond to fact in the sphere of international relations, as in every other sphere. The state cannot permanently count for more than its real value. But no state could be expected to submit to voluntary arbitration the question whether or not its historical position had ceased to be its true one, or to accept an adverse decision, if it did. The acceptance of such a decision would no doubt be a proof of the fact which it

affirmed; but such an acceptance could be brought about only by the fact having been previously ascertained by an unsuccessful war. In so far, *e.g.*, as the Franco-German war was a fight for the hegemony of Europe, it did not admit of arbitration, because, if that question must be decided, it could be decided only by a trial of strength. It was a question of fact which admitted of no voluntary solution; and in the solution of which, for practical purposes, probably even an international organisation, armed with judicial authority and executive power, would have broken down. It was a question of right, no doubt, but it was a question of right which involved the previous question of might, and that question, where it assumes such magnitude as it did on this occasion, can be answered only experimentally. On the other hand, in so far as the matter in dispute was as to whether France was entitled to the boundary of the Rhine on geographical grounds, or whether Germany was entitled to Alsace and Lorraine on ethnological and historical grounds, it might perhaps have been dealt with by arbitration, though even to that extent it would have been extremely difficult, probably impossible, to induce either party to accept the mediation of neutrals which did not involve armed intervention. Perhaps Russia, Austria, England, Italy, and America combined might have stopped the war—perhaps they might now prevent its too probable recurrence. But no action on their part could have produced the new relations which resulted from the war. Arbitration—even judicial action—can only declare relations which already exist, whereas war brings about new relations, or converts relations *in posse* into relations *in esse*. War is a process of readjustment, and, as such, of advance or retrogression, and not simply a process of barbarous litigation, as is said so often. It does not deal simply with accomplished facts, as is the case with litigation in all its forms, arbitration included. *It accomplishes the facts.* It is on this ground that I fear the "Eastern Question," too, is beyond the reach of arbitration, that question, in its essence, being the question of the preponderance of Russia in the West of Asia and the East of Europe. Here there is, no doubt, one element favourable to its application which did not exist in the case of France and Germany, viz. the willingness of one of the principal parties—the Turks—to place themselves unreservedly in neutral hands.¹

These three cases, or classes of cases, are the only ones which occur to me as likely permanently to resist the application of arbitration, as they have hitherto resisted all other forms of peaceful intervention. They leave over all ordinary disputes and disagree-

¹ As regards the past, I must reluctantly concur with Dr. Goldschmidt as to the very limited sphere within which arbitration could have been employed as a substitute for war. *Ut supra*, p. 8.

ments between civilised nations which admit of being measured by pecuniary compensation, or settled by the cession or exchange of territory to the extent of rectifying boundary-lines, rights of navigation, fishing, and the like, in short all *contestations juridiques*, (*Rechtsstreite*) as Dr. Goldschmidt would say.¹ Within these limits arbitration may be extremely valuable in removing causes of irritation by which international cordiality is interrupted, and which may eventually even lead to wars. But it is not out of questions such as these that wars generally arise, either proximately or eventually. Such a question as the *Alabama* claims might no doubt have been the *causa occasionalis* of a war, if America and England, or either of them, had been bent on it at the time. But I no more believe that, in itself, it could have been the *causa efficiens* of a war than that a quarrel between two ladies about a pair of gloves could have been so, or that the Franco-German war was caused by the German Emperor turning his back on the French Ambassador when he was drinking his waters at the bath, or rather perhaps after he had drunk them. If the *Alabama* question had not been settled by arbitration it would have been settled by diplomacy, though probably enough not till after long years of harassing, anxious, and irritating negotiation. It is as a new and improved form of diplomacy then, rather than as a substitute for war, that in my opinion we must regard international arbitration. In international more than even in municipal relations voluntary arbitration must always be of the nature of a friendly suit, and the first condition of its possibility must always be that both parties have determined *not* to go to war.

Wars arise from deeper causes than arbitration can touch, and if they are to be averted at all, it must be by deeper remedies. Of these I can see but two. The *first*, and perhaps the only one, is time and progress,—moral, intellectual, and political progress within states, and consequently juster conceptions of international relations. The *second* is a firmer, because more rational, international organisation on the *de facto* principle, which I shall attempt to describe to you hereafter, but of which, for the present, I can speak only as a *grand peut-être*.

¹ *Ut supra*, p. 8.

IX.

ENGLISH AND FOREIGN JURISTS AND INTERNATIONAL JURISPRUDENCE.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
Session 1875-76.

(Reprinted from the *Journal of Jurisprudence*.)

CONSIDERING how well, and with how much reason, our fellow-countrymen on the other side of the Tweed are satisfied with themselves, it is not surprising that they should have difficulty in understanding why foreigners do not always share their sentiments; nay, why they occasionally indicate a preference even for so obscure and benighted a race as ourselves. Now, without travelling beyond the field in which we are called to labour, or citing authorities that are strange to English ears, I think I can furnish one explanation of this bewildering phenomenon.

Mr. Gladstone, it appears, recently addressed a letter to a Professor in the University of Macerata, in which he stated to him the grounds on which he believed it would be impossible to induce either the English public or the University of Oxford to take part in raising an international monument to Alberigo Gentili. Several of the reasons which he gives are not discreditable to his countrymen; and for my own part, I entirely sympathise with the "repugnance in the present day in England to commemorate by means of monuments persons who lived so far back." If the works of such persons have preserved their memories so long, it is not unnaturally thought that they will preserve them still, to the extent to which they still continue to be worth preserving; and notwithstanding the interesting biographical study of Alberigo Gentili, which we owe to my friend Mr. Holland, the Professor of International Law at Oxford, his name certainly is not a name to conjure with, where those of Shakespeare and John Knox have failed. Compared not only with many who followed him, but with many who preceded him, he was a small and commonplace

man; and, viewing them simply as jurists, I would ten times rather subscribe for monuments to Dominic Soto or Francisco Suarez, of whom the latter was only three years older than Gentili; or, going back to a former time, and a greater than any of them,—to Thomas Aquinas.

But Mr. Gladstone's candour compelled him to add two other reasons of a less satisfactory kind. He told his Italian correspondent that the English universities, in place of being institutions for the advancement of science, and as such in a condition to join hands with learned bodies in other countries, "are regarded by the public simply as large schools for the use of students of a certain age"; and, in proof of the fact that in so regarding them the public do them no injustice, he added with reference to the science in which Alberigo was distinguished: "Besides, the scientific study of law is at present almost at an end amongst us, although it is seriously intended to seek some means of reviving it."

No copy of this letter, so far as I know, appeared in any English newspaper. But it was published in Italy, and the Italian version of it, given in the *Diritto*, has now been translated, and appears in the October number of the *Herald of Peace*. It is a letter which very few Englishmen would have written, and perhaps Mr. Gladstone's Scotch blood may have had some share in inspiring it. Nor will many Englishmen read it, now that it has been written, or trouble themselves much about it if they do. If it excites any remark in England at all, it will probably take the form of a few well-worn jokes about the Peace Party and Mr. Richard, a little chaff about Professors, and perhaps a little insolence to Mr. Gladstone. But, accustomed as we all are to freedom of speech, that will break no bones; and when some additional ignorance as to the meaning attached by Continental jurists to "natural law" has been exhibited, the usual platitudes about utilitarianism have been repeated, and the mummy—if such it deserves to be called—of old Jeremy Bentham has been fumigated with the accustomed rites, the complacency of our countrymen will be restored, and the affair will be forgotten.

Forgotten in England;—but what of Italy? Italy is the land on which, since Germany went on the "war-path," the mantle of scientific jurisprudence seems to have fallen. In no country in Europe is the relation between theory and practice at this moment more intimate,¹ the character of jurisprudence as a branch of the science of nature better understood, or the haphazard, "leap-in-the-dark" legislation on which we pride ourselves more at a dis-

¹ See, for example, Articles 6-12 of the New Civil Code of Italy (1865), with reference to private international law, translated and commented on by M. Mancini, in his admirable Report to the Institute of International Law at its recent meeting at The Hague (1875).

count, than in Italy. What, then, must Italy think of a nation of which one of its greatest, if not its very greatest intellectual magnate says, and says without the possibility of contradiction, that the scientific study of law is "almost at an end," if indeed it ever began, in it? Nor, though for the present Italy, after her long intellectual holiday, exhibits an unusual activity in the cultivation of scientific jurisprudence, both in the abstract and the concrete, is she exceptional either in the pursuit of it, or in the method which she employs. With the solitary exception of England, there is not a civilised country in the world which does not consciously strive to place its jurisprudence on a scientific basis, to bring its positive enactments into harmony with the natural laws of the relations which they seek to determine. They may succeed in this, or they may fail in it, but they all attempt it; and when an Englishman tells a foreign jurist that he does not attempt it at all, that he does not even understand what it means, that so far as he can see human relations are governed by no natural laws, and that positive laws are entirely arbitrary, the foreigner holds up his hands in astonishment, or shrugs his shoulders in contempt. When after this the Englishman talks about "principles," as he probably does in the next sentence, the foreigner in his turn is bewildered, shakes his head, and mutters something about the "Chinese."

So long as such discussions are confined to municipal law, no great harm comes to them. Foreigners admit that Englishmen rub along pretty fairly at home, though they cannot tell how; and even when they hear that, after having declared law and equity to depend on different principles, and administered them in different courts for ages, Englishmen, without the slightest attempt at scientific reconciliation, have thrown them into "hotchpot," and stirred them together by means of an Act of Parliament, they simply laugh. Should Englishmen after this continue to maunder about the distinction between perfect and imperfect obligations, *jus strictum* and *jus voluntarium*, *comitas gentium*, and the like, it will only add to the fun. But when an Englishman and a foreigner meet on the common ground of international law, the affair is more serious. So long as the Englishman accepts the results at which the foreigner has arrived, the foreigner asks no questions as to the means by which so happy a consummation was brought about. But suppose they differ; the foreigner not unnaturally is desirous of some little explanation of the "firm basis of principle" on which the Englishman tells him he relies. "Basis," cries the Englishman, "the basis of utility, to be sure!" But "whose utility?" asks the foreigner—"yours or mine?" "Neither yours nor mine," shouts the Englishman triumphantly, changing his ground, "both yours and mine,

everybody's, 'the greatest happiness of the greatest number!'" "Good," replies the foreigner; "we are out of utilitarianism and into eudæmonism. I am with you there. But how are we to agree as to what happiness means? Of your happiness I might perhaps permit you to judge, though even that is a grave question; but I should certainly like some other measure of mine, and of other people's, than your opinion. Have you no means of appealing from Philip drunk to Philip sober, no test by which happiness may be tested?" The Englishman replies that "utility" is the test; the foreigner looks at the other foreigners, and the *séance* is concluded.

It is a merciful provision that, after such triumphs as these, the conversations at which Englishmen assist at *tables-d'hôte* and in cafés are but partially intelligible to them, and that their social qualities atone for their scientific shortcomings, and gain for them a consideration as individuals which is very far from being extended to them as representatives of science or defenders of the policy of their country. But though it is well that our countrymen should be respected, as our countrywomen are admired, for qualities which, if we must choose between the two, we ourselves should prefer to the best scientific training, it is very undesirable, and surely very needless, that those of us who labour under no peculiar congenital defects, when we come before the world as diplomatists and jurists, should expose ourselves to being treated as if we scarcely deserved to be ranked amongst "vertebrate animals."

I rejoice to hear that it is seriously intended to seek some means of reviving the scientific study of law in England, and when I read such addresses as that which Sir Edward Creasy lately delivered to the Social Science Association, I begin to hope that the efforts of such men as Lord Selborne, and my friend Mr. Westlake, are at last to be rewarded with success.¹ But if Englishmen really wish to become acquainted with scientific jurisprudence, they must make up their minds to purchase the acquisition at the price that others pay for it. If they covet the superstructure, they must be contented to lay the foundation. The revival must embrace the study of ethics and mental philosophy, which for the present, too, is "almost at an end amongst us." The enterprise ought not to be hopeless in a land which produced the Cambridge Platonists of the seventeenth century, and in the present day can boast of Platonists like Jowett, and Aristotelians like our own learned and genial Principal.² English jurists do excellent historical work, as

¹ Very characteristically the *Times*, in its report of Sir Edward's address, omitted the whole of the first portion of it, in which he dealt with scientific jurisprudence; and the *Saturday Review* had its little stereotyped sneer at the "alphabet of international law," which it is unwilling to learn.

² The late Sir Alexander Grant, Bart., Principal of the University, 1868-1885.

witness Sir Travers Twiss's edition of the Black-book of the Admiralty. Why should they seem as if they had holes in their bellows the moment they attempt to breathe the more rarified atmosphere of scientific jurisprudence?

Nor is it in order to restore the intellectual prestige of our country alone that we urge this revival. Never were the commonest material interests of a country more dependent on the labours of scientific jurists than those of this country at the present time. There is scarcely any direction in which the position of England, when seen from a cosmopolitan point of view, is not exceptional. Her insular situation, her limited area, the prodigious extent of her Colonial empire, her hitherto unbroken social organisation, and consequent success in combining liberty with order, her vast trade; more than all, perhaps, the supremacy of her maritime and the relative insignificance of her territorial resources as a fighting power:—these, and many other circumstances which will occur to you, isolate her, to the extent of rendering her policy partially unintelligible, and, I fear I must add, marking her out as an object of jealousy to other nations. That her interests—her immediate interests as a separate nation—differ, and must continue to differ, from those of every other nation, is indisputable; and that interests which differ will often seem to superficial observers to conflict, is inevitable. For us to argue, then, that a particular line of policy is “useful,” is just the very last proceeding by which we are likely to commend it to foreigners. Opposing their interests to ours, as they necessarily do so long as they look at them from the one side or the other, they believe that what is useful to us must be hurtful to them. Nor do we gain their confidence, or even their goodwill, by abandoning, or professing to abandon, our interests for theirs. The case is not one for generosity and self-denial, and there is no hope of persuading foreigners to credit us with such amiable weaknesses. The notion of our abandoning a traditional policy on the ground that foreigners “dislike it,”¹ or adopting one because they like it, is a notion which we must dismiss from our minds from motives of the most obvious policy and common-sense. By adhering to claims which we defend on no higher grounds than self-interest, we excite the hatred of foreigners; by abandoning claims which we conceive them to assert on the like grounds, we excite their contempt. In order to obtain, or even to merit, their friendship, or, failing their friendship, their respect, we must give absolute reasons for the policy which we adopt,—we must show that, in the circumstances in which we and they are called upon to act, that policy is the concrete realisation of the abstract or natural law which governs the relation actually subsisting between us. With our own countrymen it unfortunately

¹ *Contemporary Review*, Oct. 1875, p. 742.

happens that the only line of argument which is effectual with foreigners would be of no avail. To offer to an English opponent to defend an existing positive law, or to challenge him to defend one which he proposed to substitute for it, by showing that it is in accordance with an absolute law by which you assume the relation to be governed, would seem to him, I am well aware, an act of gratuitous pedantry. And at the stage which his studies had reached it probably would be so. If a schoolboy tells me honestly that he does not know the multiplication-table, I may be entitled to whip him for not having learned it, but I have no right to expect him to do the rule of three. If an English jurist tells me that he does not know what is meant by natural law, or absolute law, or necessary law, or ideal law, or anything of the kind, and that his only conception of positive law is that of "law as it is," I know that his scientific pistol has no lead in it, and I am not entitled to fire at him with ball, though I may be quite justified in punishing him otherwise if he persists in blazing powder in my face. But the same defence will not avail a Continental jurist. He knows perfectly well that, be the circumstances what they may, the existence of an ideal concrete law is just as inevitable as the existence of an ideal straight line between two points; and that, unless his concrete law conforms to it, there is another and a better concrete law, in virtue of which, if I can find it, or approach nearer to it than he has done, I am entitled to call upon him to abandon that which he seeks to maintain. The relation, with its opposing factors—belligerent and belligerent, belligerent and neutral, neutral and neutral, state and state, state and citizen—be they what they may, the two points being there, I can insist that he shall stretch his ideal line between them, and determine the concrete rights and duties which it marks off on the one side and on the other. So long as I adhere to a relative standard, a standard that is resolvable into his opinion or mine, he responds to me by declamation, and the prolonged and melodious notes of my eloquent friend Professor Pierantoni of Naples—"like linked sweetness long draw out"—will be found sufficient to silence the *βρεκεκεκεξ κοδξ κοδξ* of a whole chorus of utilitarian *βατραχοί*, even when re-echoed by London penny-a-liners. But when an absolute standard is insisted on, and the banner of science is raised, men of the class of Mancini,¹ and Rolin-Jaequemyns,¹ and Neumann,¹ can no longer decline to come to the front. Even brave old Bluntschli¹ will not scorn to take sword in hand, and look out for something better in the shape of *Rüstung* than the *ipse dixit* of a non-maritime power, or a resolution of the Bremen Chamber of Commerce in 1859.²

¹ See *ante*, Lecture VII. p. 81.

² *Modernes Völkerrecht*, p. 373.

I am keenly alive to the danger of encountering such antagonists; but believing, as I do, in the instincts which have guided the traditional policy of my country, feeble as I acknowledge her scientific light to have been, I shall venture to run a tilt with them (on ground, for my acquaintance with which, such as it is, I humbly acknowledge myself to be their debtor), on behalf of the belligerent right of capture at sea, and of the neutral right of freedom of trade. Be the issue what it may, I trust my foreign colleagues will acknowledge that I have striven to do by them as they would have done by each other had they chanced to differ, and if I fail to convince them, there is at any rate a chance of their convincing me.

I. As regards the right of capturing private property at sea, then, what I assert is, that, not as a means of defence only, but as a *moyen de guerre*—as a means of bringing a legitimate war to a successful issue—it falls fairly within the principles of civilised warfare, as these principles are understood by Continental jurists.

And here I put aside at the outset, as belonging to municipal law, two questions which have often been, and indeed are usually, treated as international:—

(a) Whether the state is entitled, without security or compensation, to expose the property of a portion of its population to the exceptional risk of loss which this rule involves. This, which I call the “Chambers of Commerce” question, those who have read some letters which I recently addressed to the *Times* will know that I answer in the negative. The moment that a ship is captured, I regard it as public property; and I conceive that the state to which the owner belongs is bound to make the loss its own, taking the chance of indemnifying itself by the results of the war. In this respect the position of a ship at sea differs in no respect from that of a box of cigars in a tobacconist’s shop. If its seizure be legitimate at all, all that international law has to do with the matter is to furnish the private owner with the means of proving the extent of his loss.

(b) Whether or not it be in the power, or for the interest, of the particular state to avail itself of this weapon, supposing it to be legitimate.

The bows and arrows of our ancestors are not forbidden by the principles of modern warfare, and if any modern potentate chooses to use them, international law has no right to interfere. King Kofi did so, without reproach, on a recent occasion.

But just as little can the law of nations interfere with the opposite belligerent, and compel him to reciprocate. An appeal to it with this object by poor Kofi would have been everywhere regarded as a joke; and yet our good neighbours the Germans

regarded it as no joke at all, but on the contrary were extremely angry with us, when we laughed at them in England for the offer which they made to France, at the beginning of the late war, to renounce the right of capture of private property at sea, and still more at the lofty and injured air which they assumed when France declined to reciprocate.

That there are powers, real or apparent, which in this inexplicable world do not generate rights, is but too true; and if the power of maritime capture can be shown to fall under this category its exercise may be forbidden, and ought to be forbidden even by those who have no power to prevent it. But till this can be shown, for the non-maritime powers to come to the maritime powers and offer to surrender this right *mutually*, and then haughtily to "resume it" when the offer is declined, is just about as reasonable as if I were to go to Cardinal Manning, and propose to him that he and I should enter into a similar transaction with reference to the next election to the Papacy. If it would be a relief to my conscience to renounce my right to become a candidate, Cardinal Manning would probably have no objection; and if I chose to resume my right he would be equally well pleased; but he could scarcely be blamed though he declined to entertain my proposal of reciprocity. Nay, as matters actually stand between England and the other powers, the case is scarcely met even by this illustration. It is rather as if I were to go to the Pope himself, and propose to his Holiness that he should resign, on condition of my promising to renounce my claim to be his successor.

These municipal considerations, then, being laid aside, the question of the right to capture private property at sea, in its international aspect, limits itself to this:—Assuming a state to have the power of seizing the property of private belligerent citizens at sea, does the right to exercise this power, to the extent to which the state may conceive it to be for its advantage, adhere to the power? or is it cut off from it by the limits which international law, as the interpreter and guardian of humanity, has imposed on the exercise of belligerent power? Opponents of the class with whom I desire to deal will not revert to the doctrine of the "balance of power," and allege that this power, being peculiar to a single state, or possessed by a single state in greater measure than by other states, is itself condemnatory of its use; for on that ground the state in question would be entitled to object to the use of any weapon of territorial warfare which other states possessed in larger measure, or could wield with greater effect than itself. Nor will they attempt to ascribe an international character to the Chamber of Commerce argument on the ground that, till dealt with generally, it might act unequally in different states. If England should

guarantee her shipowners from exceptional risks, as I hope she will, and other states should fail to follow her example, that plainly is their affair. The question, as I have said, is a municipal one, with which each state is entitled to deal as it thinks fit. Lastly, they will admit that the argument that the policy is a suicidal one for England, from the amount of private shipping which she would expose to risk, is wholly irrelevant from an international point of view. If Englishmen are deceived in thinking that by means of convoys, guaranteed routes, and otherwise, they can protect their shipping and preserve their carrying trade; if they are wrong in believing, as most of them I fancy do, that no *Alabama* could ever have got more than three miles from the neutral port in which she was built if the English navy had been on the watch for her—as the American navy ought to have been, and would have been, had there either been no Foreign Enlistment Act, or had America had to deal with a less wealthy customer—then that is England's affair. Should we ever stand to a neutral power in the position in which the United States stood to us on that memorable occasion, I think I can predict that, in place of wrangling over the clauses of an unintelligible Foreign Enlistment Act, and looking forward to filling the pockets of his countrymen, and paying the expenses of the war by means of damages, direct and consequential, as the American Ambassador in London did, our Ambassador would simply telegraph for a ship of war; and I for my part should look forward to her proceedings with a very different measure of confidence from that which I should repose in the "Three Rules," even as amended by the Institute of International Law. But this is an "aside" to my countrymen, and wholly by the way. My foreign colleagues know very well that, whilst the legitimacy of war is recognised, a warlike weapon cannot be taken out of the hand of an independent state, internationally, merely for its own protection, as a knife would be taken out of the hand of a child. Recognition implies majority, the recognised state is *sui juris*, and can be disarmed, internationally, only on the ground that the weapon which it wields, or the use which it makes of it, is exceptionally inhuman. It is on this narrow ground that I challenge my learned opponents to meet me, and to object to the seizure of private property at sea.

1st, then,—Is it more destructive to life and limb than any other form of warfare? I call for statistics!

2nd. Is it more injurious to morality than the march of a hostile army, the billeting of its soldiers, and the levying of contributions in a hostile country? I challenge them to prove it!

3d. Is it less possible for the state to guarantee the citizen against exceptional loss in the case of property seized at sea than on land? Let them explain the difference!

4th. Is the English navy a less disciplined force, the honour of its officers or the honesty of its men less reliable, than in the case of any land-force in the world? I beg them to make the most searching scrutiny into the facts.

In insisting that the decision of the general question, whether or not England be entitled to retain, and exercise if she chooses, the right of capturing private property at sea, shall be perilled on their answers to the purely international questions I have here enumerated, I think my foreign colleagues will admit that I am not dealing with them unfairly, or departing from the rules of the game, as we mutually understand them. That no answers to these questions are embraced in any of the many attacks that have been made on what is still acknowledged to be the rule of the law of nations, with which I can be expected to be acquainted, is an assertion which I make with little hesitation, and for making which, if it can be disproved, I shall "eat humble pie."

II. As regards the capture of private property at sea, I have said that "law as it is," the existing and recognised law of nations, if there be such a thing, is on our side. My Continental colleagues desire to alter it; and I argue for its retention on the ground that it is in accordance with "law as it ought to be." Every separate entity is entitled to vindicate its rights by the use of the means at its disposal, unless those means can be shown to be illegitimate: England is such a separate entity, and the means in question cannot be shown to be illegitimate: England, then, is entitled to their use, if she thinks proper to use them. Such is the syllogism which, in behalf of my country, I venture to nail on the gates of the Institute of International Law.

In the second of the two burning questions of the day we stand in a different and less fortunate position. As regards the question of the responsibility of the neutral state, in its corporate capacity, for the conduct of its citizens in their private capacity, we have conceded the principle; we have submitted in our Foreign Enlistment Acts, and still further and more definitely in the Three Rules of Washington, to its concrete realisation in a number of points which for the time being seemed to us to be for our advantage; and now that Continental nations, believing the principle to be for their advantage to a still greater extent, are disposed to impose it on us as a general rule of the law of nations, we begin to see that it involves the prohibition of neutral trade in articles in which we are accustomed to deal, and we kick up our heels against it. We are here the assailants of "law as it is," or at all events as we have attempted to make it, in virtue of what we have come somewhat too late to perceive is "law as it ought to be."

Now here, even more than in the former case, it is our interest

to lay hold on the horns of the altar of science; for it is in a recurrence to and a revision of principle alone that our safety consists. Little accustomed as we are to connect practice with principle, it will not be contended even by us that we can go on with the principle, the consequences of which we accept when they suit ourselves, and reject when they suit our neighbours. Logic, whether we like it or not, is a cosmopolitan weapon, which we cannot refuse to handle, and if we consent to handle it in this instance, I believe our neighbours will very soon show us by means of it, that the principle we have unwarily accepted goes the length of the total abandonment of trade between neutrals and belligerents. To what extent it may be pushed in practice will then be a question not for us but for them. That they mean to push it to the extent of prohibiting trade in munitions of war is a fact of which they already make no secret; and he who trusts to definitions of munitions of war for protection from its further inroads on neutral trade is surely trusting to very slippery ground. If we admit the principle, whether we seek to evade its application by definition, or by simply stopping short at the point which suits us, we shall be hopelessly outvoted, as we were at The Hague, the other day, in the question of maritime capture.

But the revision of a principle—still more, as I fear is necessary in this case, the reversal of a principle, which we ourselves have accepted, nay, of which up to the unfortunate *περιπέτεια* which befell us at Geneva, we had made ourselves a sort of apostles to the Gentiles—means, not learning alone, but learning in its most odious and irksome form, that, namely, of unlearning. Still it is to this distasteful process that, as the condition *sine qua non* of progress, one-half at least of the intellectual activity of every generation of mankind must be devoted. One-half at least of what we call truth is error; and that half must always be unlearned before the other half can be profitably applied. And we ourselves have unlearned a great deal in our day. We have unlearned protection. All men were protectionists down nearly to the end of last century, and it was very hard for them to be told by a theorising old Professor of Moral Philosophy in Glasgow that protection was a mistake. But they were told it, and it was explained to them, and gradually they came to see it, and even to admit it. The growth of the science of political economy, and the prodigious development of trade, on the new basis which was thus furnished to them, are probably the most remarkable examples, the one in theory, the other in practice, of the effects of the triumph of knowledge over ignorance, of reason over prejudice, *by means of the study of natural law*. In politics proper we are far from having

yet reached this point. Men have not yet devoted themselves with any consistency of effort to the study of the laws which govern the relations of the state to the citizen, or the citizen to the state, and there is consequently no science of politics in the sense in which there is a science of economics. But here too we have made some progress. We have forgotten some error, if we have not learned much truth. In 1832 we forgot Toryism. In 1867 we forgot Whiggery. Since then we have been engaged in forgetting Radicalism; and when it is forgotten the process of learning may possibly begin. Even on the Continent, where men cannot forget as it were from the outside, as we do, and have a troublesome fancy for going at once to the root of the matter, the central error of the French Revolution—that of absolute equality with its fatal corollary of universal and equal suffrage—is *sub judice*, and the best minds in France already reject it. A distinguished French statesman and Academician, M. de Parieu, came up to me the other day and shook me warmly by the hand. “I know you are an advocate for proportional representation,” he said. “Hold to that; you are right (*Tenez à cela, vous avez raison*). We cannot realise it in France at present, but it is the only means by which liberty can be prevented from degenerating into anarchy.” In principle I do believe we were thoroughly in the right, and I have never seen anything like an honest attempt to meet what I and others said on that subject, on the ground of principle. In the practical suggestions with which we accompanied our argument, in my own case more for purposes of illustration than for any other reason, we too may have had much to unlearn. I do think we were somewhat “doctrinaire”; and it has since occurred to me that we should have been more in accordance with our social traditions had we urged the giving of plural votes, not directly to each individual in proportion to the grounds of political consideration which he might possess, but indirectly, by giving votes to bodies to which persons of intelligence and respectability belong—to clergymen, lawyers, physicians, bankers, members of a Chamber of Commerce, and the like, as they are given to graduates in our universities. This, I think, was Earl Grey’s plan; and I believe it is in this form rather than in that which I myself proposed,¹ that, to a certain extent, our common object may yet be attained. In advocating the enfranchisement of important bodies of the community, we should have the benefit of their support against the dead weight of Radical opposition, and Whig and Conservative timidity; and something of the sort ought certainly to be attempted when the question is again awakened up by a County Franchise Bill. In this country, moreover, I begin to be hopeful

¹ See *Constitutionalism of the Future*.

that, even without the political safeguard of a graduated suffrage, we may escape anarchy by means of our social organisation, which has happily remained undisturbed by revolution, and by which our feeble and anomalous political constitution is propped up. So long as political leadership is conceded to intelligence and culture, the result is the same, whatever may be the character of the electoral body. But we have been sailing as yet in the calm of unwonted prosperity, and our anxieties can scarcely be removed till we have seen the results of a general election under the influences of dear food and low wages. "Cassandra's"¹ warnings may be more prophetic than we venture to hope.

But, though we may trust to it overmuch, it is the ethical not the intellectual element in English character to which England is indebted for her exceptional well-being as a state. Reverence for God, and, where reverence is due, for man—a characteristic so deplorably wanting in France—is intuitive in England. For the gifted, the aged, the long-descended, there is an instinctive tendency to make place; the effort is not to rival but to imitate our betters; and society, from the very bottom, thus takes an upward direction. When foreigners come to understand us better than they do, they will see that it is in this, and not in the theoretical balance of our "marvellous constitution," which they have examined so anxiously and imitated so vainly, that they must seek for the explanation of our political stability and progress. Paradoxical as it may seem, I do not hesitate to assert, that as regards not only the guidance of conduct, but the formation of opinion, there is a certain advantage in the preponderance of the moral over the intellectual element in the character of Englishmen. Not only is the love of truth stronger as compared with the love of victory, but the process of unlearning is less hard to a people whose opinions continue to a great extent to rest upon feeling, than to a people who have reasoned them out, and are satisfied that they are the logical results of assumptions which may possibly be false, and at all events are not likely to be entirely true. If the principle requires revision, you get at it more readily where no process of reasoning, in itself probably irrefragable, stands between it and the conclusion on which action depends. Of the facility with which we get rid of principles which we never reasoned out very logically into their consequences, the distinction between law and equity, which I have already mentioned, and the doctrine of the *comitas gentium* as the basis of private international law, our deliverance from which in England we owe to Mr. Westlake, might serve as examples.

I have been led to this reflection by a difference which seemed

¹ *Rocks ahead, or the Warnings of Cassandra*, by W. R. Greg.

to me to exist between the position of my foreign colleagues at The Hague, and that commonly occupied by publicists in this country, with reference to the Neutrality Laws. Though, in their present form, these laws are the work of Englishmen and Americans—who are only Englishmen once removed—I believe that foreigners, having learned them, will have greater difficulty in unlearning them than either Englishmen or Americans. The accuracy of the logical process by which foreigners are in the habit of deducing them from the principle of the responsibility of the state in its public for the citizen in his private capacity, on which we stumbled by accident, and which from a feeling of our wider acquaintance with maritime affairs more especially they accepted at our hands, will shelter them from their scrutiny as it will not shelter them from ours. On the other hand, in dealing with foreigners there is this advantage, that with them it is possible to disprove an erroneous principle by bringing it to an absolute test, a mode of proceeding which it would be vain to adopt with Englishmen or Americans. They never deny the authority of Nature, or decline an appeal to her.

Conscious of these counterbalancing advantages and disadvantages in the one direction and in the other, it is not without much hesitation that I venture to submit the following brief attempt at a re-examination of the principle of neutrality, on which the question of the responsibility or non-responsibility of the state in its corporate capacity for the conduct of its citizens in their private capacity depends, to the tribunals of English and Continental criticism.

General principle of Neutrality.—The natural, and, as such, the ideal conception of the relation between states at war and friendly states which desire to remain at peace with them, is IMPARTIALITY.

As their mutual friend, the neutral state must, if possible, act as the friend of both. It is this conception, and not that of INDIFFERENCE, which the positive law of nations must seek to realise; and I neither share nor envy the opinion of those who, whilst proclaiming neutrality to be a friendly relation, declare it to consist in standing contentedly aside and seeing two friends tear each other to pieces. The attitude of indifference between human entities, whether individual or corporate, bound together as they are by the links of mutual rights and mutual duties, I regard as one which nothing short of necessity can justify. It was as identified not with "peace," but with *indifference*, that I applied to neutrality the epithet of an abnormal relation, an epithet which, as used by me in this connection, my distinguished colleague Professor Bluntschli has misunderstood.¹

¹ *Communications relatives à l'Institut de Droit International* (1874), pp. 278-9.

Now it is in the presence or the absence of this necessity that the distinction consists, as I believe, between the relation of the neutral state to belligerents in its corporate capacity, and when viewed as an aggregate of free men.

A. The state in its corporate capacity is bound, if possible, to assume the attitude of a mediator, peaceful if may be, warlike if need be, and for the assumption of this attitude the state ought not rashly to disqualify itself by a proclamation of neutrality. But mediation is intervention, a relation which excludes, and is excluded by, the conception of neutrality. Unlike neutrality, it involves a decision of the question at issue, and means of carrying that decision into effect, neither of which may be within the reach of the state.

Should intervention be rendered impossible by want of power, or want of knowledge of the situation, I believe that there are scarcely any conceivable circumstances in which the state, in its corporate capacity, can be impartial, otherwise than by abstaining absolutely from all interference. In this case the identification of impartiality with indifference is inevitable, and neutrality implies absolute non-interference.

I arrive at this conclusion mainly on the following grounds. (a) The state, in its corporate capacity, is a physical unity, and cannot act in two opposite directions at the same time. It must be wholly with one belligerent or the other. (b) Even if such action were physically possible, it would neutralise itself and leave the belligerents where they were. But all neutralisation of force is forbidden by the natural law of economy. God and nature are ideal economists, and to neutralise force is to sin against absolute law. (c) The state in its corporate capacity has its forces within its control. It can consequently save force by abstaining from action. It can be impartial by being indifferent, and only by being indifferent. Indifference, meaning thereby an entire suspension of the ordinary arrangements of peaceful intercourse, is thus forced upon it, and justified by its necessity.

B. The neutral state, viewed as an aggregate of private citizens, on the other hand, can in no circumstances control its forces entirely; and its power of doing so becomes less and less as liberty advances. The extent to which this is the case in free countries is scarcely conceivable to those who live under despotic governments. The attitude of indifference is in this case excluded by the same necessity which warranted it in the other; and the central conception of impartiality can be realised only by leaving the natural laws of intercourse to operate freely. By attempting artificially to arrest them—to tie the hands of its citizens, and lock them up within its borders—the neutral state deceives both itself and the

belligerents. The attempt is one in which it never has succeeded, and never will succeed. Nor ought it to succeed ; for its success would be gained at the expense of a violation of private by public order, and a consequent invasion of individual freedom. I entirely subscribe to what M. Mancini has said on this subject, in another connection : " Les droits d'ordre privé appartiennent aux hommes comme hommes, et non pas comme membres d'une société politique " (Rapport à l'Institut de droit Intl., Session 1875, p. 22). Provided the legitimacy of war in general, and of the war in question in particular, be recognised, fighting on either side is not a crime, *eo ipso*, with which municipal law can deal. The state has no more right to constrain the citizen, in his *private capacity*, to be neutral, than the citizen has a right to constrain the state, in its *public capacity*, to be belligerent. When he has paid his taxes to the neutral state of which he is a member, his obligations as a neutral citizen are discharged. He has conformed to the policy of the state in the only capacity in which the state is known to him. Again, the state knows him only as a citizen, and its responsibility has reference to him only in that capacity, unless he be identified with it, and his individuality sunk in it, by holding its commission. It is only by adhering rigorously to this distinction that any limits can be set to the responsibility of the neutral state. The moment it is departed from, and that actions which do not violate private order are forbidden on public grounds, freedom of speech is endangered as well as freedom of trade, we may be forced into ultramontanism or democracy, as the Vatican or the Revolution gains the ascendancy, and it is at the option of belligerents to hold neutral states responsible for their platform orators and newspaper editors, just as much as for their ambassadors and secretaries of legation.

The rule here then must be, to leave both belligerents to regulate their relations with the citizens of the neutral state by the ordinary motives of sympathy and self-interest, or, within the region of trade, by the laws of supply and demand. By throwing its markets, like its press, absolutely open, or rather leaving them so, the neutral state acts to the belligerents with the same impartiality as if it absolutely closed them ; and whilst the former proceeding certainly is easy, the experience of every war has proved the latter to be impossible.

Assuming the distinction here indicated to be valid, let us try to work it out into concrete rules of action.

1st. *Obligations of the neutral state in its corporate capacity.*

(a) The neutral state in its corporate capacity shall not fight on the side of either belligerent, either on land or at sea.

(b) It shall not permit the belligerents to fight, to arm or to drill

troops, or to man or equip ships of war, or for war, within its jurisdiction.

(c) It shall not permit any person in its service at the commencement of the war, or who shall subsequently enter it, whether military or civil, to fight, to enlist in the ranks, or to aid either belligerent, diplomatically or otherwise, even after he has quitted its service.

(d) It shall not give, lend, or sell an object which may aid either belligerent in the prosecution of the war; and as every object which the belligerent desires must, more or less, possess this quality:

(e) It shall not trade with either belligerent even in articles which do not possess the character of munitions of war, or give or lend him such articles.

(f) It shall not increase or diminish its import or export duties to either belligerent during the war, even with a view to its own profit.

(g) It shall not lend money, whether gratuitously or for interest, either directly through its officers or indirectly through private persons.

(h) Fugitives from either belligerent shall be permitted to enter its territory and to quit it at will; but such arms or other munitions of war, including money, as they bring along with them shall be given up to the enemy.

2d. *Limitations to the responsibility of the neutral state when viewed as an aggregate of private citizens.*

(a) Trade, in every species of commodity, between neutral and belligerent citizens in their private capacity shall be absolutely free, without distinction between such commodities as may or may not possess the character of munitions of war.

(b) Neutral citizens in their private capacity may trade with belligerent states in their corporate capacity, whether directly through their public officers or indirectly through private agents.

(c) Neutral citizens may give or lend money or any other commodities, whether possessing the character of munitions of war or not, to belligerent citizens, or to belligerent states.

(d) The neutral state shall not be bound to inquire into the motives which may lead to transactions between its citizens in their private capacity, and belligerent citizens or states; and it shall be no breach of neutrality though these transactions should not be entered into for purposes of gain.

(e) The neutral flag shall cover both neutral and belligerent property, without distinction between what may or may not possess the character of munitions of war.

(f) The Right of Search shall be limited to the ascertainment of the nationality of the vessel, and the fact that the cargo is the property of private persons.

(g) The registration of the vessel in the neutral country, in the name of a neutral citizen in his private capacity, shall be guaranteed by the neutral state ; and if any question as to its genuineness shall arise, such question shall be decided by arbitration.

(h) In so far as its genuine character is not disputed, such registration shall be accepted as conclusive of all questions as to its real ownership. The onus of proving that the cargo, or any portion of it, belongs to a neutral government, and that it is destined for a belligerent port, shall rest with the belligerent who makes the allegation, and the question shall be decided by arbitration.

(i) Belligerent ships shall be entitled to enter the ports of neutral states and to trade with neutral citizens in their private capacity, in commodities of every kind, without reference to their object, or to whether or not they be given for value received.

(j) Neutral citizens in their private capacity shall be entitled to convey commodities, including arms and munitions of war, to belligerent citizens or belligerent states, whether by land or by sea.

(k) Neutral citizens in their private capacity shall be entitled to construct ships of war, to prepare them for the reception of their equipment, and to sell, lend, or give them to belligerent citizens or belligerent states, whether within the neutral territory or elsewhere.

(l) The neutral flag shall cover ships constructed for warlike purposes, so long as they are neither armed nor equipped, and continue to be registered as the property of neutral citizens.

(m) The neutral flag shall cover all commodities, munitions of war included, on board of such ships so long as they are stowed as ordinary merchandise, and the crew unarmed.

(n) The responsibility of the neutral state for the conduct of the crews of such ships shall cease when they quit neutral waters.

(o) The neutral registration shall cease to guarantee the property of a ship which equips herself, or procures an equipment, after she has quitted neutral waters ; and she shall be liable to be seized under the neutral flag, her whole cargo confiscated, and her crew detained as prisoners of war.

3rd. *Enlistment.*

(a) Neutral citizens, not in the service of the neutral state at the commencement of the war or afterwards, shall be entitled to enlist in the service of either belligerent, either within the neutral state or elsewhere ; but their neutral citizenship shall cease from the moment that the fact of such enlistment is proved to the satisfaction of the neutral state.

(b) Neutral citizens so enlisting shall be regarded from the moment of enlistment as citizens of the belligerent state whose service they have joined. They shall not be liable to seizure in a private vessel carrying the neutral flag and possessing a neutral registration, so long as they commit no act of hostility; but their conveyance by a public ship, or any ship belonging to the neutral state beyond neutral waters, shall be regarded as a breach of neutrality.

(c) Where an Extradition Treaty subsists between the neutral state and a belligerent, other than the belligerent into whose service a private citizen has entered, such citizen, whilst he continues within the jurisdiction of the neutral state, shall be liable to be surrendered under such treaty; but it shall be regarded as a breach of neutrality on the part of the belligerent to whom he is surrendered if the citizen so given up be treated with greater severity than an ordinary prisoner of war.

(d) A belligerent formerly a citizen of a neutral state shall be entitled to no protection from his own state, either diplomatically or otherwise, so long as he holds the commission of a belligerent; but on renouncing such commission, whether at the termination of the war or previously, it shall not be regarded as a breach of neutrality though his former citizenship should be restored to him.

I submit these rules to the consideration of international jurists, chiefly for the purpose of illustrating the distinction for which I contend between the position of the neutral state in its corporate capacity, and when viewed as an aggregate of private persons. I am far from imagining that, even when adjusted to existing circumstances by persons possessing greater practical knowledge than I at all pretend to, they would ever entirely satisfy any two belligerents at the same time. That, I fear, is what no neutral laws can hope to accomplish. But over our existing neutral laws they would have, I think, these two great advantages:—they would admit of being really observed by neutral powers; and, when so observed, they would, without interfering with the private rights of private neutral citizens, be impartial in reality, whether they were felt by belligerents to be so or not. It is on this latter ground mainly that I urge their claim to scientific recognition by the Institute, and that I hope they may, in principle at all events, commend themselves to peace-loving powers.

X.

OF THE DENATIONALISATION OF CONSTANTINOPLE AND ITS DEVOTION TO INTERNATIONAL PURPOSES.¹

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1876.

TACITUS looked back on the fifteen years of the reign of Domitian, during which silence had been imposed on the Roman world, as *grande mortalis ævi spatium*, struck out of his own life and the lives of his contemporaries. At the commencement of my fifteenth session, I cannot but reflect with thankfulness on the precious opportunities of speech which I have enjoyed, with no Domitian to make me afraid, and with a little band of friends and fellow-labourers who have never failed to sympathise with me in the studies which I loved.

Nor have we enjoyed freedom and tranquillity alone. When I call to mind the magnitude and importance of the public events which have marked the period of history through which we have been privileged to live, I cannot but feel how imperfectly we must have appreciated them if they have taught us nothing. Viewed in their external aspect, as wars of dynasties and races, with their consequent changes of political frontiers, they have indeed been little else than a repetition of many previous pages of human history. But that history never really repeats itself is seen in its influence on contemporary thoughts; and the events of our time have engendered conceptions of the reciprocal rights and duties of separate nations, which I believe to be new to mankind. Necessity is said to be the mother of invention, and the proverb is as true of moral as of physical necessity. As a reaction against the aggressive policy of the first Napoleon, the idea of the absolute independence of each separate state, with its consequent doctrine of non-intervention, assumed so exaggerated a form some twenty years ago as to weaken our feelings of international responsibility.

¹ This Lecture was published in pamphlet form in 1876.

The very foundations of International Law were shaken, and men began to ask themselves again, not how nations were to be separated, but how they were to be united, and made to work together for the objects of their common existence. It was this attitude of thought which gave rise to the conception of reciprocal obligation, which has recently been elaborated by scientific jurists with a view to the adjustment of international disputes. But science, as usual, has been more successful in defining the end to be attained than in suggesting the means for its attainment; and if I am correct in my reading of the signs of the epoch at which we have now arrived, it is not improbable that necessity may a second time step in to our aid, and solve the problem which she originated. In the only possible answer which I can see to this Eastern Question, I am not without hope that we shall find the only possible answer to the central question of International Jurisprudence.

There is one direction, and one only, in which the almost unlimited freedom of speech which we enjoy as citizens seems to suffer some limitation in the case of a person in my position. As the occupant of a Chair in a National University, I have never conceived it to be within my province to criticise the conduct or weigh the motives of public men; and from all expressions of opinion which might bear the aspect of party feeling, I have carefully abstained. Wherever I have expressed approval or disapproval, I have invariably done so by bringing the course of policy in question to the test of what I conceived to be the natural law of the relation between the parties, in the circumstances in which that relation had arisen; and that those circumstances were likely to have been better known to the statesmen who guided our policy at the time than they were to me, even after the event, was a consideration which I hope I was not unwilling to remember. To this course I shall adhere on the present occasion; and, putting aside all reference to past or present complications, shall address myself at once to what I believe all parties, both in this country and elsewhere, regard as the central problem of international politics—the ultimate disposal of Constantinople.

By the decree of nature, as it would seem, Constantinople has been stamped with a cosmopolitan character. The key of Europe to Asia, and of Asia to Europe,—always strong, and, by modern appliances, believed capable of being rendered impregnable, whether by land or by sea,—its possession by a strong power would be equivalent to universal dominion. In the possession of a weak power, on the other hand, the possibility of its seizure must render it a perpetual bone of contention and a source of mutual distrust. The question of the disposal of this coveted object, then, at the very first glance, seems to defy solution; and one is sometimes

tempted to wish that it could be blown into the air or sunk in the sea. It is the feeling of utter hopelessness which this problem engenders, more than any other cause, I believe, which has led to the course of merely negative policy with reference to the Eastern Question which has long been followed by the Western powers, and which still finds some favour in this country. Incapable of transcending the conception of nationality, and sensible of the inadequacy of that conception when brought to bear on cosmopolitan interests, the Western powers took refuge in a fiction. Afraid of the living, they called the dead to their aid. They put the sword of a hero into the hand of a corpse, and agreeing amongst themselves to hold him to be alive, they set him up as the guardian of the *status quo*. In the keeping of a phantom state, which was no longer subject to the changes and chances of mortality, it was hoped that Constantinople had been placed finally beyond the reach of mortal ambition. The Sublime Porte was accordingly admitted by acclamation into the family of European nations, and the Treaty of Paris pronounced him to be entitled to the rights and responsible for the duties which the law of nations imposes on civilised states. Safe within the barrier of red-tape drawn around him by the Treaty, his independence was guaranteed to him by the doctrine of recognition, the Alpha and Omega of International Law!

The doctrine of recognition, as expounded by nature and by history, is not an absolute but a conditional doctrine, and before nature and history red-tape is powerless and treaties must bow. We cannot call the dead to life, we cannot convert fiction into fact by the doctrine of recognition. If recognition could have stopped the course of human events, Constantinople would have belonged, not to the Ottoman Empire at all, but—to go no further back—to the Eastern Empire, for the Eastern Empire was recognised for more than a thousand years, and the Ottoman Empire has not yet been recognised for much more than four centuries. But, though vastly grander in its character and in the traditions which clung to it, the conditions of recognition, of which the first is autonomous existence, failed in the case of the Eastern Empire, just as they have failed in the case of the Ottoman Empire, and with the failure of the *de facto* foundation on which it rested, the technical superstructure of its recognition fell to the ground. A peaceful disintegration might possibly have been secured for it by timely and judicious intervention; but no such intervention occurred, and the imperial city was taken by the Turks, as it will soon be taken from the Turks, by force of arms. To leave Turkey to the Turks, bankrupt as they are of every quality of a nation, is simply to hand it over to the Russians, and to fulfil the prophecy, of which

Gibbon reminded us, and which they never forget, that in the last days they should be masters of Constantinople.

Now I am not one of those who have ever seen grounds for the jealousy and suspicion which the mere mention of the name of Russia awakens in the minds of so many in this country. Much of the ambition with which we charge Russia seems to me perfectly legitimate, and greatly to her honour. There can be no question, at all events, that it is an ambition which very closely resembles our own, and that so far from being a badge of discord, it ought to be a bond of union and a source of sympathy between us. So far as we have yet gone, I see no reason to doubt that the efforts both of Russia and of England have tended to advance the cause of civilisation against barbarism, of order against anarchy; and those who fight for so good a cause surely ought not to fight against each other. Russia's relation to Poland is indeed a black page in her history. But it is a page on which her name does not stand alone; and those whose names are not there inscribed have other pages which they would gladly turn in silence.

In Asia, Russia from the north is doing precisely what we have done from the south; she is bringing *Cosmos* out of *Chaos* by the sharp remedy of the sword, applied with terrible rudeness, it appears, but applied for ultimate objects which we have no reason to doubt are honest and commendable. In Europe again, she has chosen the side which we ourselves, as a progressive Christian nation, would certainly have espoused, had it not been for the abnormal direction which jealousy of her ultimate designs has given to her national policy. With these feelings with reference to the conduct of Russia in the past, and willing to believe those of her statesmen who repudiate in her name the dream of cosmopolitan supremacy which we are accustomed to impute to her, I warmly reciprocate the sentiments of a friend and colleague at St. Petersburg, much in the confidence of the Government, who writes to me thus: "I have always thought that an alliance between England and Russia—a sincere accord between the most powerful maritime power, and such a military power as Russia—would be the best means of putting an end to the shameful Turkish Government." After describing the vehemence both of the religious and political feeling in Russia, he adds: "A war between Russia and the Turks would here be most popular, and would raise the patriotism and enthusiasm of the nation to the highest degree. In such circumstances, you will agree with me that our Emperor, whose love of peace and loyal character are beyond every doubt, must possess extraordinary energy in order to maintain European peace, and not to break the accord with the European powers; for you know that Turkey exists, thanks to

the jealousy between the Christian nations. But the actual state of things in Turkey cannot remain intact: it must be changed, and for that purpose a strong accord between the great powers is indispensable. As for me, I humbly think that England cannot remain an uninterested spectator of what is going on in Turkey; neither the interests of England on the Continent and in Asia, nor her political traditions, would allow it. I think the possession of Egypt would not be a sufficient guarantee for keeping up English authority in India, and the English fleet would be unable to keep open English trade at the mouths of the Danube, if Turkey were under the sceptre of a great European power. From that point of view I believe that the Eastern Question is not a question between Austria and Russia; on the contrary, I am convinced that an alliance, based on sincere sympathy with the Turkish Christians, and mutual confidence between Russia and England, is the best way to put an end to the shameful régime existing in some parts of the Ottoman Empire."¹ My friend does not mention the subject of Constantinople, but that question inevitably looms in the distance. No arrangement which fails to embrace it can claim any higher character than that of a mere temporary makeshift; and I confess that, greatly preferable as I believe Russia to be to Turkey for the present, and greatly more hopeful as I am of her future, I should tremble to see her placed in the prominent position which must necessarily belong to the possessor of Constantinople. Russia is a hopeful scholar, but her serious schooling under Peter the Great began not much more than a century and a half ago, and that is not a long enough course of instruction for a state which is to occupy so important a cosmopolitan position. Apart from the objection which exists to any single nation, the immaturity of Russia is a special objection in her case, which I regard as altogether fatal.

If we put the rule of the Turks, then, and the rule of the Russians at Constantinople, aside, the one as a sham, the other as a reality inconsistent with the interests of mankind, is there any remaining solution within the limits of nationality? Austria alone is not strong enough either to assert her claim or to maintain it. If joined by the German Empire, the case might be different. Such an alliance would, of course, bring France as well as Russia into the field, and would practically leave the decision in English hands. Either Austria and the Empire,

¹ As his name will give weight to his words, I need not hesitate to say that the words are those of Dr. F. de Martens, who combines the offices of Professor of International Law in the University of St. Petersburg and of an *attaché* to the Foreign Office, and who was sent by the Russian Government as their scientific representative to the recent Conference at Brussels.

or Russia and France, if in alliance with England, might probably prevail; but prevail at the expense of a war the most terrible that mankind has ever seen,—and prevail for what? The substitution of Austrian for Turkish rule at Constantinople would doubtless be a vast gain to the subject populations, and amongst single nations Austria is that the selection of which would probably be least objectionable on international grounds. But the recognition of Austria at Constantinople would be a mere paper-recognition, like the recognition of Turkey by the Treaty of Paris. The moment that the alliance which had achieved it was broken up by some new complication in European affairs, its *de facto* basis would be at an end, the claim of Russia would be revived, and the other powers would find themselves just where they were. The other combination, between Russia and France, and England, could have no better result. Neither France nor England could hold Constantinople alone; and Russian support could scarcely mean anything else than Russian supremacy, dictation, and ultimate possession.

The nationalisation of Constantinople being thus eliminated, what do you say to its denationalisation? Is it conceivable that, ceasing to belong to any single nation in particular, Constantinople should become the common property of civilised mankind, and be devoted to their common purposes?

Mere denationalisation, it is true, is a negative conception, closely resembling that which the Western nations have hitherto attempted to realise by placing it in the keeping of a dead hand. Nature abhors negations, and a negative conception is consequently always unrealisable. A *res nullius* is a thing in search of an owner; and it must be a very different commodity from Constantinople which fails to find one. The claimant whom nature always tends to favour, moreover, is the usufructuary. In International Law it is an established principle that a title to vacant territory cannot be acquired by a mere proclamation, by the hoisting of a flag, or any other empty ceremony. Till the territory has been occupied and turned to use, it is open to the next comer. In order to acquire a common title to Constantinople, then, the nations of Europe must not only keep each other from occupying it severally, but they must occupy it, and use it in common—as a thing common to them all, or, as we say shortly in municipal law, “a Common.”

This consideration brings me to the second of the two problems which I propose to discuss.

The ultimate problem of International Jurisprudence, as I have often said in this place, is the establishment of a self-supporting and self-vindicating international legislature, judicature, and executive.

It is on the solution of this problem that the conversion of

International Law from a positive system in the scientific sense, into a positive system in the practical sense, confessedly depends. Science, by investigating and defining international relations, may determine international rights and duties in special circumstances, as it may determine them in general. It may discover and proclaim the positive law which ought to be enacted, and even the judgment which ought to be enforced. But it can neither enact nor execute; and hence the inherent weakness of international law which rests upon reason alone, as contrasted with national law which rests upon reason and force. Even private international law becomes positive, in the practical sense, only at the point at which it ceases to be international, and comes within the sphere of municipal enactment and enforcement. But no municipal recognition or enforcement of public international law is even conceivable; for any single state which should give law to other states, and enforce it on them, would become *the* single state, and international relations would cease. It is with the problem arising out of this inherent defect in International Law that all the higher minds devoted to its cultivation have ultimately been occupied. From Henry IV. and Queen Elizabeth to Kant and Cobden, they have knocked in vain at the envious door which shut them out from peace and progress, and one temporary makeshift after another has been resorted to for dispensing with a solution which seemed unattainable. I have no time at present to dwell with you, either on the schemes which have been evolved by successive generations of speculative jurists, or the projects by which diplomatists have sought to rebalance the ever-shifting balance of power. We shall revert to them in due season, and for the present it may suffice to remark that, apart from the other difficulties which stood in their way, the failure of all of them becomes intelligible when we perceive that, without a single exception, they have sought to realise two objects, the realisation of which nature has forbidden to man. The first of these was permanence, the *status quo*—perpetual peace and absolute non-intervention; the second was the equality or equalisation of states—for, strange to say, the two conceptions have not been distinguished, and the advocates for equalisation of the most revolutionary kind are in general the staunchest upholders of the doctrine that all recognised states are already equal, and that the republic of Geneva counts for as much as the greatest monarchy. Now there is neither permanence nor equality in this world. They are conceptions at variance with the laws of God and the nature of man; and any system or scheme of politics, whether national or international, which seeks to realise them, is *eo ipso* condemned.

But there has been, if I am not mistaken, another cause of

their ill success which I have not hitherto pointed out. The proposal has always been to intrust international legislation to a Congress consisting of the representatives of the executive departments in individual states, and not of the representatives of the legislative departments. It was by ambassadors, plenipotentiaries, or other representatives of the prince, and not by deputies or delegates of the people, that international laws were to be enacted. This arrangement was more in accordance with the spirit of a former age than with that of the age in which we live; and as it still lingers in the proposal of Lord Stratford de Redcliffe—by far the most rational proposal for the solution of the Eastern Question at present before the public¹—I think it very important that the objections to it should be pointed out. No popular outcry, it is true, has hitherto arisen against it, beyond that undertone of dissatisfaction, always to be heard, with the mysterious and irresponsible manner in which foreign politics are arranged. But it is to it, I feel sure, that we must ascribe that ignorance of foreign affairs, and those consequent alternations of indifference and passion which induce the most cultivated nations, like “dumb, driven cattle,” to rush blindly into disastrous wars, and to maintain those still more disastrous warlike preparations which sap the resources and threaten the very existence of civilisation. If, in place of sending one plenipotentiary to determine the policy which it should adopt in accordance with the views of the executive department at home, each of the five great powers were to send, say fifty, and the smaller powers a corresponding number of representatives of the national will, to discuss international politics annually, and bound itself by treaty to shape its policy in accordance with the results of their deliberations as ascertained by a general vote, I believe that a means of international education and an element of international conciliation would be thereby called into activity, the importance of which it is scarcely possible to exaggerate. When I speak then of Constantinople being utilised for international purposes, it is for such purposes as these. It is with legislation that we must begin, for legislation is the source of all government, whether national or international. Before the judge can apply law, or the magistrate can enforce it, the legislature must tell them what law they are to apply and to enforce. An international tribunal, with nothing in its hands but a scientific code and nothing behind it but a sentimental executive, for all practical purposes is dumb and impotent; and it is for this reason that I have always listened with a tinge of scepticism to the laudations which I have been

¹ *The Eastern Question*, by the late Viscount Stratford de Redcliffe, K.G., G.C.B., with preface by Dean Stanley.

accustomed to hear heaped on the great modern discovery of international arbitration. Legislation, adjudication, and execution by physical force if necessary, are inseparable conceptions, any one of which, apart from the others, becomes meaningless. Government of every kind is the union of the three. But government of every kind must have a local habitation. International government, not less than national government, must have its fulcrum. Now, it is this fulcrum which I propose to find for it by the denationalisation of Constantinople.

"But what do you make of the Turk?" cries my practical friend, eager to take refuge, even behind the Turk, from anything so threatening as a new idea, and ready to have a Russian bullet through his brains at any time rather than expose them to the torture of thinking. My reply is, that I would make of the Turk all that a civilised man can ever make of a barbarian—namely, a pupil. I would treat the dear fellow—dear to us in so many senses—with considerate kindness; but I would give up the farce of pretending that he was *sui juris* when, if not in his dotage, he was plainly in his minority, and send him to school. "But the Turk would not go to school," says his friend and protector, sympathising with him, not unnaturally, in that feeling. Did his friend and protector never hear of the "compulsory clause"?

The very first proceeding, of course, must be a joint occupation of Constantinople by the European Powers; and the presence of such a body of troops as they could send into it, and maintain in it too, at a cost utterly insignificant when compared with that of a war amongst themselves, would immediately place the Moslem in Europe in a position almost identical with that now occupied by the Moslem in India. This latter consideration furnishes us, I think, with an answer to what appears to many, and has often appeared to myself, as one of the most serious difficulties attaching to our abandonment of the policy which we have hitherto pursued with reference to the Turks—the undesirable relation, I mean, in which it might place us to our Moslem subjects in India. The Mahometans of India are of a higher race, and can boast of a grander history and a more advanced civilisation, than ever was exhibited by the Turks; and yet we treat our Moslem fellow-subjects as inferiors, whilst we profess to treat their European co-religionists, who never produced a single cultivated man or woman, as equals. It is true that so far from impeding the gradual advancement of the native populations of India to a footing of equality with ourselves, we strive to aid and accelerate it by every means within our reach. But we do not affect to believe in it till we know it as a fact. Why should not the same policy with reference to the Turks be pursued by the

International Government at Constantinople? In the presence of their betters, the only option left to the Turks would be between development and dissolution, and it is the only option which, on a wider view of God's providence, He offers to any of us. Precautions against the risk of a massacre of the Christians in the remoter provinces would of course require to be taken; and one of the first measures, I should fancy, would be to provide them with arms. All kinds of minor difficulties would, of course, arise, and all kinds of obstacles would be raised up; but as the government at this stage would necessarily be in the hands of a board of military and naval officers, I do not see that, with the overwhelming resources which would be at their disposal, these need to be insuperable. The screw at their command would crush all opposition.

The moment that life and property were safe, and that the civil government—which of course would partake of a republican character—was established, mere curiosity and love of novelty would lead to a prodigious influx of population of the wealthiest class. The whole yachting world would be on the wing. Constantinople would immediately become a place of fashionable resort, and ultimately of residence. Prices would rise enormously, trade would increase, and money, that universal salve, would heal many a sore. The private property of the Turks would be as safe, and indeed far safer, than it is at present; and, as the chief holders, they would be the chief gainers. As the expenses of the International Government would fall mainly on foreign nations, and the local imposts would be honestly levied and spent, the Turks, and still more their Christian fellow-countrymen, would be relieved from the burden of taxation which now weighs them to the earth.

With these advantages, it is quite conceivable that, in a very few years, the International Government might become extremely popular with the lower classes of the native population.

As regards the wretched Sultan himself, his position would be no worse than that of one of the native princes of India, or of the dethroned monarchs of Europe, of whom so many have been sent to wander about the world in our own day. A handsome income would be given him, hard-boiled eggs would be supplied to him *à discrétion*, with croton oil to rectify them, and freedom to exercise his religion would be guaranteed to him, as to all other subjects of the state.

The relation of the provinces to the central state would be a subject for after-arrangement, and would probably not be the same in every case. As a rule, however, the suzerainty now enjoyed by the Porte would be transferred to the International

Government. The same arrangement would probably be adopted with reference to Egypt, and might gradually extend itself to the Asiatic provinces. Here, however, the influences of trade and colonisation, and of those potent solvents, money and time, might be patiently waited for. All that would be requisite, whilst the provinces remained under Turkish rule, would be that the life and property of the Christian populations should be protected; and with so powerful a Christian organisation in their immediate vicinity, such protection could be readily afforded. Last, but not least, *the bondholders would be paid*; for the International Government, like all other civilised conquerors, when it took possession of a province, would, as a matter of course, hold itself liable for its debts.

By such means as these, it seems scarcely too much to hope that, in a few generations, the fairest portion of our planet might again be rescued from the hordes of sanguinary and hitherto irreclaimable barbarians by whom it has been plundered and wasted for more than a thousand years. Very curious and interesting results, not only of a political, social, and religious, but of an ethnological, physiological, and even a philological order, might be ultimately anticipated from an organisation so new to the experience of mankind. But if, in our own day, Constantinople could be placed safely beyond the reach of national ambition, and International Law could be raised to the character of a positive system springing out of an International Legislature, dispensed by an International Judicature, and enforced by an International Executive, we might well "rest and be thankful."

XI.

DOES THE CORÂN¹ SUPPLY AN ETHICAL BASIS ON WHICH A POLITICAL SUPER- STRUCTURE CAN BE RAISED?

Introductory Lecture to the CLASS OF PUBLIC LAW,
Session 1877-78.

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NEVER, surely, was the old saying that "we must neither weep over human affairs nor laugh at them, but try to understand them" more in place than in present circumstances. What is the real meaning, the true significance, of the hideous phantasmagoria of blood and suffering and crime which our newspapers present to us every morning? We cannot turn away from it if we would, and we would not if we could; for it is not to "daff the world aside, and let it pass," that you and I come here.

The extremes of sympathy and frivolity which now divide the popular sentiment of this country between them are, I trust, equally alien to the frame of mind in which you are about to commence the study of Public Law. We cannot hope indeed that, even in this quiet haven of contemplation and thought, we shall be altogether delivered from the agitation of the world without; but, as far as in us lies, we must strive to look at the present through the calmer light of the past and of the future; or rather, I ought to say, we must strive to see the present as if it were past, in order that the future, which really concerns us, may disclose itself.

I by no means say that we are not to judge of, and even to influence, if we can, that more immediate future which we regard as the present. If there be anything in the conduct either of one of these belligerents,² or of both of them, which transcends the limits of legitimate hostility, the limits of the application of force which civilised nations have set to themselves, and which in the main they have now faithfully observed for generations, we fail in

¹ Having no opinion of my own, I adopt Sir William Muir's spelling of this word.

² The Russians and the Turks in 1877.

our duty to mankind, ourselves included,—nay, we become accomplices in crime,—if we neglect to stigmatise it, and, to the extent of our power, to prevent it.

Now, the slaughter of the vanquished, the murder of the wounded and of prisoners of war, is a thing of this kind; and if it be true (and I fear there is no doubt of it) that such murders, if not formally commanded, are recognised and approved of, and thus form part of the system of warfare adopted by one of those combatants, then, by continuing to recognise that combatant as a legitimate belligerent, we become accomplices with him in a breach of the law of nations.

This is indeed a very serious matter, because the respect in which human life is held in any age or country is the surest measure of its civilisation, and the levity with which it has been treated by a portion of the press and of the public in England will certainly be regarded elsewhere as an indication of the moral degeneracy which has resulted from our great material prosperity, and the isolation from European opinion in which we have placed ourselves.

I am anxious to believe, or at any rate to hope, that there is much exaggeration in the reports of the savage mutilations and inhuman tortures to which these brave and unhappy men are said to be subjected before they are put to death. Even in civilised warfare there is much reckless destruction of life; but the perpetrators of such atrocities as these must take rank, not with civilised nations, but with savages—with Ashantees, American Indians, or the worst of the Shemitic races of antiquity; and if the Turks, against whom only they are alleged, be really guilty of them, their continued recognition as belligerents is impossible. Humanity will know how to deal with those who thus proclaim themselves *hostes humani generis*. But for the present, though there are dark suspicions which hang over it, and though these suspicions are strengthened by what we shall see presently to be the character of the creed which it professes, I am willing to acquit the Turkish Government, and even the Turkish regular troops, of so grievous a charge, and to confine myself to the simple question of the light in which we must regard the practice of refusing quarter, or, in other words, of putting prisoners of war to death by shooting them.

There is one instance, and I hope one only, not of a civilised Government certainly, but of a party in power in a civilised State, having taken upon it the responsibility of formally instructing its generals to conduct warfare on this savage footing. During the Reign of Terror in France in 1794, Alison tells us that the Convention passed a decree “prohibiting their armies from giving quarter to the British or Hanoverians who might fall into their hands.” “Republican soldiers,” said Barère in the report on

which that decree was founded, "you must, when victory shall put into your power either English or Hanoverians, strike without mercy; not one of them ought to return to the traitorous territory of England, or to be brought into France. *Let the English slaves perish, but let Europe be free!*" To this decree the Duke of York replied by an order of the day, worthy of the nation whose forces he led and the cause with which he was intrusted. "The National Convention," he said, "has just passed a decree that their soldiers shall give no quarter to the British or Hanoverian troops. His Royal Highness anticipates the indignation and horror which has naturally arisen in the minds of the brave troops whom he addresses upon receiving this information. He desires, however, to remind them that mercy to the vanquished is the brightest gem in the soldier's character, and exhorts them not to suffer their resentment to lead them to any precipitate act of cruelty on their part, which may sully the reputation they have acquired in the world. In all the wars which, from the earliest times, have existed between the English and French nations, they have been accustomed to consider each other in the light of generous as well as brave enemies, while the Hanoverians, the allies of the former, have shared for above a century in this mutual esteem. Humanity and kindness have at all times taken place the instant that opposition ceased, and the same cloak has been frequently seen covering those who were wounded, friends and enemies, while indiscriminately conveyed to the hospitals of the conquerors. The British and Hanoverian armies will not believe that the French nation, even under their present infatuation, can so far forget their character as soldiers as to pay any attention to a decree as injurious to themselves as it is disgraceful to their Government; and therefore his Royal Highness trusts that the soldiers of both nations will confine their sentiments of abhorrence to the National Convention alone, persuaded that they will be joined in them by every Frenchman who possesses one spark of honour or one principle of a soldier." This noble document, as Sir Archibald Alison justly calls it, had the desired effect. "The humane efforts of the British commanders were seconded by the corresponding feelings of the French officers, and the prisoners on both sides were treated with the same humanity as before the issuing of the bloody decree" (vol. iii. p. 148).

I am quite aware of the frightful severity with which domestic insurrections have been put down in many countries, and I acknowledge with shame the existence of a dark spot in our own domestic annals which a century and a half of exceptional humanity has not wiped away. I shall be reminded too, I dare say, of the manner in which the Indian Mutiny and the Parisian Commune were suppressed. To such allegations there is the simple answer that, in both cases, the sufferers were criminals, convicted of the

foulest offences, and that the mode of execution, by blowing them from the guns, which our officers selected, whilst it was the most impressive, was at the same time the most humane manner in which they could have been put to death. What I speak of here is the needless destruction of the lives of men accused of no individual offences, proceeding from motives of vengeance, mingled perhaps with religious fanaticism, but chiefly as a means of bringing the war to a successful conclusion by inspiring terror into the enemy and saving expense to the captor. That this is a measure which is at variance with the laws of war, even on the harsh and doubtful construction of them which warrants reprisals, and altogether inconsistent with the conditions of civilised warfare, I need not stop to prove to you; and that what is inconsistent with the conditions on which belligerent rights depend justifies their withdrawal by neutral nations, and warrants intervention, are propositions which will be equally incontestable in the eyes of every one who possesses the most elementary acquaintance with the law of nations. It is, I fear, but too likely that this country will continue to look on, as it does at present, if not approvingly, at least indulgently. Its efforts will be confined to extenuating the facts brought to light by the newspaper correspondents, as in the case of the Bulgarian atrocities, and to telling the Turks, as it did at the conference at Constantinople, that they had better do right, but that if they prefer to do wrong, we, at any rate, will do nothing to prevent them. But how is the matter likely to be viewed elsewhere? It is not probable, I dare say, that the Ottoman Empire, even if successful in the present struggle, will again become dangerous as an aggressive power, though it ought scarcely to be forgotten by Austria that it is not yet two centuries since it besieged Vienna, and that John Sobieskies are not always at hand. The consequences of permitting the Turks to combine the weapons of barbarian with those of civilised warfare which we have put into their hands may, in so far as they are concerned, be confined to the present war.

But it is not in relation to the present war alone, or to Eastern interests, that this matter is to be viewed. The disciplined soldiers of Russia are being subjected to a strain to which no other soldiers have ever been exposed, and it may well be a subject of anxiety to other nations whether their own men, who have made up their minds to face death in the field, will be found equally indifferent to massacre, more especially if accompanied by torture and mutilation. Our soldiers have often fought against savages, but never against savages armed and disciplined like the Turks; and even as regards ourselves, one would fancy that it was not a very safe lesson to teach our Indian Mussulmans that if they take us prisoners they may cut our throats. The interests of England are, however,

not the only interests involved in this question, though it would often seem as if we thought so; and it is very unlikely that the military nations of the Continent will be equally blind to the wider consequences which might result from a retrograde step of such magnitude in the laws of war. It is easy to let loose the lower passions of humanity, and very difficult to curb them again. Nothing is so infectious as crime, and who can tell where such a practice as that of slaughtering prisoners of war may stop, if it is once permitted to a State which, as we are exultingly told so often, has been formally admitted into the bosom of the European family? That France will, at no distant date, again tempt the fortune of war by attacking Germany and striving to recover her lost provinces and *prestige*, is what her elaborate military preparations and the uncertain state of her political horizon render too probable. Suppose that, with the greatly increased power which the unification of Germany will enable her to bring at once into the field, and with the advantages for military purposes which a highly organised monarchy must possess over a mushroom republic torn by internal jealousies and factions, the result should be the same as on the last occasion. Every German tells you that another campaign will not be permitted to terminate as the last one did. If Germany conquers again, she must conquer, we are told, once for all, and that the war will cease only with the dismemberment of France. France, then, will be fighting, not for conquest or for glory, but for national existence; and what assurance have we that in such straits her new Republic will be more humane than her old Convention, or that a second time her generals will be too magnanimous to obey her? One would fain think such an occurrence as the refusal of quarter by one European nation to another to be impossible, and a few months ago I should certainly have thought so. But with the thoughtless indifference to life which, without any reason at all, we ourselves exhibit at present, who can venture to dogmatise with reference to the feelings of France in the terrible circumstances in which she might thus be placed? The French are a gifted and charming people, but they are an impulsive people, and their impulses have not always been in the direction of humanity. The history of France is deeply stained with blood-guiltiness, whilst the French are patriotic beyond almost any other race. Is it not conceivable that, in their agony, they might say to themselves: "The Turks gave no quarter; Europe looked on with indifference, and England's sympathies were not alienated. Why should not we do the like to save France? France is dearer to us than oceans of German blood. The plea of necessity is far stronger than that which Napoleon urged when he shot the four thousand Albanian and Arnout prisoners after the siege of Jaffa. Let us shoot our

prisoners!" These are certainly painful and terrible thoughts, very unlike those which fill the heads of club-gossips and post-prandial praters, or of the darling butterflies who throw down their rackets at lawn-tennis and clap their pretty hands when they hear of Turkish victories;¹ but they are thoughts which, in present circumstances, cannot well be absent from the mind of the occupant of a chair which exists for the purpose of proclaiming the laws of peace and war; and there is one statesman in Europe, at all events, who, I think I can promise you, will neither dismiss them lightly, nor go into hysterics over them.

But let us turn to a theme which, though bearing more directly than even the conduct of the combatants on the estimate which we must ultimately form of the war, will carry us out of the actual struggle. I know, from long experience, that when we get into the work of the class, I shall find most of you to possess a fair, and many of you an enviable, acquaintance with the *Ethics* of Aristotle. The study of that great little book is one of the best traditions of Oxford, and those who are educated in Scotland and on the Continent, if they study it with less scholarly care, bring perhaps more philosophical insight to bear on it. With the *Politics* it may be that you are not quite so familiar, but you no doubt know enough of it to be aware that it is based on the *Ethics*,—that it is just the *Ethics*, in short, exhibited in the life of the State. And what Aristotle taught of politics is equally true of jurisprudence, for jurisprudence either embraces politics as a part of it, or, if we use it in the more limited sense of jurisdiction, and identify politics with legislation, jurisprudence becomes the granddaughter of ethics, and the family descent is ethics, politics, and jurisprudence. But, any way you take it, ethics is the mother-science. If we have no ethics we can have neither politics nor jurisprudence, neither State nor citizen, neither municipal nor international law.

Moreover, amidst all the diversities of religions, or at any rate of creeds and rituals, there is one ethical ideal which is common, not only to the nations of Christendom, but which all the races of mankind that have arrived at any high degree of social or political organisation have invariably worked out for themselves. The conceptions of right and wrong presented to us by the Greek moralists and by the Roman jurists, by the Ten Commandments and by the Sermon on the Mount—nay, even by the Veda and the Zendavesta—as regards the relations of man to man, are, in their leading features, identical; and the life of the family, and the life

¹ On re-perusal I fear lest these words should read like a charge of heartlessness against my fair countrywomen. They were not so intended.

"But evil is wrought by want of thought,
As well as want of heart."

of the State, what we call civilisation, is the realisation, more or less complete, of these common conceptions, more or less definite, of this common ideal. Any race or nation, then, which starts on its political career with this ethical ideal before it, however faintly it may be seen, and which follows it at however great a distance, is on the right road, and all that other nations have to do is to help it forward. They are not bound to accept it for more than it is worth at the stage of progress which it has reached; but they have no more right to despise its weaknesses, or to lose patience with its faults, than they have to despise or lose patience with a child. They are entitled to guide it and even to control it, but not to desert it. It is a living, even if it should not be a healthy, political germ; and every true political germ, with time and care, may grow into a State.

If, on the other hand, the conception which a race or nation has formed to itself of right and wrong, of that which is to be done and of that which is to be left undone, be at variance with this common ethical ideal, then it is a conception the realisation of which would be the antithesis of political existence, and which, in so far as it was realised, would be anti-social and anti-political. However we may deal with the members of such a community as individuals, however high may be the hopes which we entertain of them, to aid them in the development or even the perpetuation of their system would be to fight against civilisation. Even if our aspirations should rise no higher than to be on the winning side, such a policy on our own part would be suicidal; for unless we are to become pessimists ourselves, we must believe in the ultimate triumph of what we recognise as right.

What then is the character of Mahometan ethics? What is the conception of the human relations on which the Ottoman Empire rests, and which it seeks to realise?

As you may possibly have gathered from what I have already said that my own opinion of Mahometanism, particularly as exhibited by the Osmanlis, is not very favourable, it may be desirable, in now approaching the subject directly, that I should give you the opinion of some one else. Now, the highest authority whom I can quote to you at all is, I believe, Sir William Muir, the author of the life of Mahomet, one of our great Indian governors and statesmen, and the brother of our distinguished friend and benefactor, Dr. John Muir.¹

Beginning with the bright side of the picture, Sir William thus sums up the merits and defects of the system: "We may freely concede that it banished for ever many of the darker elements of superstition for ages shrouding the Peninsula. Idolatry vanished

¹ Founder of the Chair of Sanskrit in the University of Edinburgh.

before the battle-cry of *Islām*; the doctrine of the unity and infinite perfections of God, and of a special all-prevailing Providence, became a living principle in the hearts and lives of the followers of Mahomet, even as in his own. An absolute surrender and submission to the Divine will (the idea conveyed by the very name of *Islām*) was demanded as the first requirement of the religion. Nor are social virtues wanting. Brotherly love is inculcated towards all within the circle of the faith; infanticide is proscribed; orphans are to be protected, and slaves treated with consideration; intoxicating drinks are prohibited, and Mahometanism may boast of a degree of temperance unknown to any other creed.

"Yet these benefits have been purchased at a costly price. Setting aside considerations of minor import, three radical evils flow from the faith in all ages and in every country, and must continue to flow *so long as the Corān is the standard of belief*.¹

"*First*, Polygamy, divorce, and slavery are maintained and perpetuated, striking at the root of public morals, poisoning domestic life, and disorganising society.

"*Second*, Freedom of thought and private judgment in religion are crushed and annihilated. The sword still is, and must remain, the inevitable penalty for the renunciation of *Islām*. Toleration is unknown.

"*Third*, A barrier has been interposed against the reception of Christianity.

"They labour under a miserable delusion who suppose that Mahometanism paves the way for a purer faith. No system could have been devised with more consummate skill for shutting out the nations over which it has sway from the light of truth. *Idolatrous* Arabia (judging from the analogy of other nations) might have been aroused to spiritual life, and to the adoption of the faith of Jesus; *Mahometan* Arabia is to the human eye sealed against the benign influences of the gospel. Many a flourishing land in Africa and in Asia, which once rejoiced in the light and liberty of Christianity, is now overspread by gross darkness and barbarism. It is as if their day of grace had come and gone, and there remained to them no more 'sacrifice for sins.' That a brighter day will yet dawn on these countries we may not doubt; but the history of the past and the condition of the present is not the less true and sad. *The sword of Mahomet and the Corān are the most stubborn enemies of civilisation, liberty, and truth which the world has yet known.*"

The sword of Mahomet is still active, and the *Corān* is still

¹ The italics are Sir William Muir's, now Principal of the University of Edinburgh.

the standard of belief and the rule of duty, civil as well as sacred, which guides it. But the *Corân*, you may say, admits of various interpretations, and may mean something very different to a cultivated Turk, if such there be, in our own day, from what it meant to the immediate followers of Mahomet, or even, perhaps, to the Prophet himself. Now on the present meaning attached to the *Corân*, and, consequently, on the ethical conception of Mahometanism in our own day, I can call a witness before you who will be less suspect than even Sir William Muir.

Listen to the Sheik-ul-Islam's prayer :¹ "O most merciful God, have mercy on us, and protect us Thy faithful people. Almighty God, show no mercy to the infidels. Merciful Giver of all good things, strengthen the Ottoman arms. By Thy powerful arm discomfit the proud and perfidious house of the impious. Glory be to God, the Lord of the Universe ! The grace and the blessings of God be upon our Lord, His Prophet Mahomet, and upon all His pious followers ! O God, strengthen Thy servant our Sultan, the chief of Thy favourite people. Protect us and our country, and sweep off the face of the earth all infidels opposed to us and to our holy and true religion. Destroy, Almighty God, every vestige of the impious Russians, of the equally impious Hellenes, who are groping in the darkness of impiety like swine in the mire, and who have dared to raise their sacrilegious hands against Thy faithful people and against Thy Prophet Mahomet. Disperse, O God, their coalition ; scatter their assemblies ; break, O God, their weapons ; diminish and annihilate their ranks. Send them, O God, quickly to their destined place of punishment. Pour upon their heads, O God, all Thy wrath and indignation ; place them, O God, in the central abode of the wicked ; visit them with the indignation by which Thou hast hitherto punished Thine enemies. O God, confound their tongues ; let their blood flow in torrents ; let their heads be trampled upon by Thy faithful servants, the Osmanlis ; break down their authority, their rulers, their strongholds ; exhaust their power. O God, make their children orphans, their wives widows, and their mothers mourners. Confound their mental faculties. O God of mercy, let there be left no vestige on the earth of the impious Russians, the Hellenes, the Slavonians, and other infidel Franks allied to or sympathising with them. Encompass them, O God, on every side with grievous plagues. Overthrow them with Thy terrible wrath, with fires, with massacres, and shipwrecks ; by strangling, by pestilence, and by cholera, by famine and by earthquakes. Make their cities empty of inhabitants, shake them by Thine eight avenging spirits. As these mischievous and impious infidels endeavour to injure us, let

¹ *Scotsman*, Monday, 17th September 1877.

them, O God, suffer in their own eyes, in their senses, in their wives, in their children, and lastly in their own lives. Let Thine anger and indignation, O God, be hurled upon them like hailstones ; make them and their gods a plunder to all those who believe in Thee and in Thy holy Prophet, Mahomet, with whom be the grace and the blessing of Almighty God."

At first sight this official document looks to us like a grim joke, and we are reminded of the oath which Mr. Shandy kept upon his mantelpiece. But Orientals are not given to joking. The prayer is a terrible reality, and exhibits, by the most authoritative and irrefragable evidence, the present Mahometan conception of the rights and duties which subsist between the faithful and unbelievers.

A great deal is often made by the admirers and apologists of Mahometanism—not excepting even Sir William Muir, as we have seen—out of the fact that Mahometans believe in *one* God. The character of his Prophet admittedly will not stand close scrutiny, and the less that is said the better about some of his Suras,—such, for example, as that in which God rebuked him for his scruples when he conceived a passion for the wife of his own adopted son and bosom-friend, and enjoined him to gratify his unhallowed desires. "If such revelations were believed by Mahomet sincerely to bear the Divine sanction, it can," as Sir William Muir naïvely remarks, "be but in a modified and peculiar sense"! But then it is all right about Allah. He is "the forgiving, the merciful, God alone, beside whom there is none other."

Now, observe, if Allah be a god who can be expected to listen to such a prayer as that which I have just read to you, you will probably be of opinion that one Allah is one too many. But I don't think it really matters very much whether there be one Allah or half a dozen of them. Indeed, as they would be certain to quarrel, two of them, at any rate, would be an advantage. As matters stand, however, the Mahometan has no choice. The Allah of the *Corân* is the Allah whom he must worship, and whose scheme of government he is bound to realise ; whilst the total absence of moral qualities is, as my learned colleague, Professor Flint, has pointed out, his leading characteristic. "Although the Suras of the *Korân*," he says, "are all, with one exception, prefaced by the formula 'In the name of Allah, the God of mercy, the merciful,' there is extremely little in them of the spirit of mercy, while they superabound in a fierce intolerance."

Now what I wish to bring out is the false position in which a Government resting on the *Corân* necessarily places itself when it professes to act either to its own non-Mussulman subjects or to other nations in accordance with the ethical principles which guide

and have always guided the higher races of mankind. With the rather important exceptions of polygamy and slavery, the relations of Mahometans to each other, as established by the *Corân*, may pretty fairly realise the central ethical doctrine, that rights and duties are reciprocal and co-extensive. But the moment that the faithful come in contact with unbelievers this ethical creed not only ceases to act,—as all our ethical creeds, the Russian and Bulgarian no doubt included, too often do,—but it is positively reversed. What was affirmative becomes negative, and what was negative becomes affirmative. The premises from which a Mussulman deduces his rules of conduct towards an unbeliever are precisely the converse of those from which he deduces his rules of conduct towards a believer; and if he promises that his conduct shall be the same, he simply promises to violate the *Corân*. It is in this consideration that we are to seek for an explanation, and even for a partial justification, of what we often talk of as the inconceivable obstinacy and bad faith of the Turks.

The so-called Turkish Constitution was a farce got up for temporary objects so transparent as scarcely to deceive even an English ambassador. Totally unsuited both to the character of the people and to the stage of civilisation which they had reached, even had they been a Christian nation, no Government could have converted it into a reality; and yet the Turkish Government, by proclaiming it, put themselves technically and formally in the right; for they put themselves on the same level—the same “platform,” as our Yankee cousins would say—as the foremost of the nations into whose family they had been admitted. The *Corân* was not violated by a promise made to the infidel to do what was impossible, and yet that promise took away from the other parties to the Treaty of Paris the last formal pretext for interference in the internal affairs of the Ottoman Empire. Constitutional government was the accepted symbol of liberty and equality in the West, and when the subjects of the Porte had got these promised blessings, the demands of diplomacy were satisfied. It was an ingenious device which put the Turkish Government straight with the political world, and caused them no practical embarrassment whatever! But the Turkish Government *could* have punished the murderers of the Consuls at Salonica, and the authors of the outrages in Bulgaria and elsewhere; and thoughtless people wondered why men with a shrewd enough notion of their own interests should have chosen to set them at liberty, to decorate them, and to promote them. The Turks have no very tender regard for the lives even of believers: why, then, in the straits in which they were placed, should they not have gratified their friends and admirers, and discouraged their detractors, by the sacrifice of half

a dozen scoundrels whose places could have been supplied by a dozen scoundrels at any time? The answer is that they were forbidden by the *Cordn*. These men, criminals in our eyes, were worthy and meritorious persons in the eyes of those who walked by its light; and the Government, by rewarding them for the slaughter of the infidel, was acting in the strictest accordance with its precepts. It is the same, of course, with the slaughter, and even with the torture and mutilation, of prisoners of war, and with those still worse abominations of which correspondents have accused them in their conduct towards non-combatants and their wives and children. It is possible that in some vague and indefinite manner the Porte forbids its disciplined soldiers to commit such acts. But we have little security for the enforcement of its orders, so long as the law, which overrides all temporary regulations, dooms all infidels to destruction, condemns them to suffer "in their eyes, in their senses, in their wives, and in their children," and sends them to "the central abode of the wicked"; and the Institute of International Law has brought to light the fact that, unlike Russia, the Porte has adopted none of the ordinary means employed by civilised Governments to bring the laws of war to the knowledge of its officers and men.

Is it of a Government, then, actuated by such motives and hedged in by such obligations as these, that we desire to stand out before the world as the friends and protectors? Is it for such a Government that we spent our blood and treasure at no distant period, and for the maintenance of which we are willing to exert our influence again as soon as a fitting occasion shall offer? That, gentlemen, is a question which is surely well worth your consideration as students of public law. If you should be of opinion that I have misrepresented the ethics of the *Cordn*, my whole contention falls to the ground, and Turkey may have a great future before her. But do not attempt to separate Mahometan politics from Mahometan ethics, and to hope that a Mahometan Government can stand on a basis on which no other Government ever stood, either in heathen or Christian times.

You will observe that I have spoken of Mahometanism strictly as an ethical and not as a religious system, and that the standard of ethics with which I have compared it is not that of Christianity, but that which is common to Christianity with the cultivated nations of antiquity. In doing this I have been actuated by no insensibility to the higher and purer character of Christian ethics, nor to the claims on our sympathy which a Christian nation has in representing them. The higher the ideal, the higher will be its realisation; and from what I have learned of Russian ethics from occasional intercourse with Russians myself, but chiefly from the

very able work¹ of Mr. Mackenzie Wallace, a gentleman whom I am proud to claim as a former pupil, I have no hesitation in saying that the ethical code of Russia, even at the stage of development which it has reached, is superior to that of the great heathen nations in their best days. But I am willing to stop at Aristotle, and to admit that if you can pick the ethical system which you have learned from his pages out of the *Corân*, the experiment of prolonging the political existence of the Ottoman Empire may be well worth trying.

In conclusion, let me call your attention to a subject bearing on the "interests of this country" which does not as yet seem to have attracted the notice of those who arrogate to themselves the character of their special guardians.

That we ourselves have not hitherto had much confidence in the Government of the Ottoman Empire is indicated by the existence of an institution of which very little has been heard in recent discussions, but which now seems not unlikely to place us in an awkward position.

The recognition of the Ottoman Empire by the Treaty of Paris, of which we hear so much, did not extend to the recognition of its legal tribunals or its municipal law. In Turkey, as in China, Japan, and other semi-barbarous countries, the civilised nations of Europe have always maintained separate tribunals of their own, called Consular Courts. The object of these courts is to administer the law of the country to which they belong, both civil and criminal, to their own countrymen, to the exclusion of the local tribunals and the local law. We ourselves keep up a large and costly establishment for this purpose at Constantinople. It is plain, of course, that such tribunals constitute an *imperium in imperio*, and their existence in Turkey is a complete *reductio ad absurdum* of the "integrity and independence of the Ottoman Empire." The poor Sultan, we are told, complained of them bitterly to two English members of Parliament who interviewed him the other day,—and no wonder. What should we think of the integrity and independence of England if a corresponding Turkish tribunal were established in London? But the right which England thus asserts, in common with other civilised communities, has been defined and rendered specific in her case by the Act 6 & 7 Vict. c. 94, entitled "An Act to remove doubts as to the exercise of power and jurisdiction by Her Majesty within divers countries and places out of Her Majesty's dominions, and to render the same more effectual"; and by an Order in Council, of 12th Dec. 1873, which sets forth that "Her Majesty the Queen has power and jurisdiction within the dominions of

¹ On Russia.

the Sublime Ottoman Porte," and that "Her Majesty may hold, exercise, etc., such jurisdiction, in the same manner as if Her Majesty had acquired such jurisdiction by cession or conquest of territory."

England, the great champion of Turkish independence, thus stands conspicuous in her denial of the ability of the Turkish Government to administer municipal law,—to determine and enforce the rights and duties which exist between man and man in the ordinary intercourse of life ! But whatever may be the effect of these tribunals on the international position of Turkey, their effect on the international obligations of England, as a neutral power, is very curious. Mr. Freeman, I believe, has the merit of having been the first to point out, in the October number of the *Contemporary Review*, that the apology which we are in the habit of making for the non-enforcement of the Foreign Enlistment Act, when recognised States are in question—viz. that its transgressors are beyond our jurisdiction—has, in consequence of the existence of these Courts, no validity when its transgressors are in Turkey. The Foreign Enlistment Act of 1870 (33 & 34 Vict. c. 90), as you are no doubt aware, declares that every "British subject within or without Her Majesty's dominions who accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty . . . shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the defender is convicted ; and imprisonment, if awarded, may be either with or without hard labour." This Act is recited in the Queen's proclamation of neutrality, which then goes on to say : "We do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever, contrary to the provisions of the same Statute, upon pain of the several penalties by the said Statute imposed, and of our high displeasure." The Foreign Enlistment Act, which in itself is a municipal enactment, is thus made part of an international transaction, and receives a quasi-international character. I have often explained, and when the proper time comes I shall again explain, to you the grounds on which I disapprove of the Foreign Enlistment Act, and, as a necessary consequence, of the Treaty of Washington, for which we paid so smartly at Geneva. I think every State which, from whatever cause, claims to occupy a position of neutrality whilst two friendly States are at war, is bound to see that its *own* attitude to the combatants is one of real impartiality ; and such impartiality, I think, means absolute non-participation. Even verbal expressions of sympathy with the one combatant, or of antipathy to the other, may affect the issue of the war ; and, if

proceeding from an official source, are consequently a breach of neutrality. Neutrality in this sense, then, as regards the State itself, I conceive to be an obligation incumbent on it by the law of nations. But I distinguish, and I think the law of nations, apart from Foreign Enlistment Acts and Treaties of Washington, distinguishes along with me, between the responsibilities of the State in its corporate capacity and as an aggregate of private persons. I do not believe it to be *possible*, without interfering in the internal government of other States (if then), for any State practically to prevent its citizens from mixing themselves up with foreign wars; I do not think the law of nations requires it to do so; I do not think it for the interest either of belligerents or of neutrals that it should do so; and I am always sorry when, by the quasi-international character which the Queen's proclamation gives to the Foreign Enlistment Act, this country undertakes this needless and impossible task.

But the answer that to perform this obligation is impossible, though perfectly true, and an excellent reason for our declining to undertake to perform it, will scarcely serve our purpose after we *have* undertaken to perform it; and the answer that its performance would involve the violation of the independence of the State whose ranks our citizens have joined will seldom seem satisfactory to the other State against which they are fighting. But the aggravating circumstance in the present case consists, as I have said, in the fact that Turkey is not really an independent State at all, that a complete judicial mechanism for the purpose of interfering with and controlling her in the exercise of many of the most important of her functions as a free community exists, and is in our own hands; and the question comes to be whether we are not bound to set that mechanism in motion to enforce our own law against those of our own citizens whom we declare to be criminals. No view that we can take of Turkey seems to save us from the dilemma. If we say that she is a protected State, fighting under the eye of our fleet, then why did we issue a proclamation of neutrality? If we say that she is an independent State, then why do we not enforce the neutrality we have proclaimed, if we can? The plea of impossibility, it is true, overrides all obligations, and it probably may be resorted to in all sincerity, if the Consular authorities at Constantinople should be called upon to seize the Admiral of the Turkish fleet¹ and imprison him, whether with or without hard labour. The Foreign Enlistment Act can no more be enforced in Turkey than anywhere else, and what has occurred is a new argument for its abolition. But the plea of impossibility does not always save those who employ it from the consequences of having

¹ Captain Hobart.

undertaken impossible obligations, though the plea of insolvency seems to save the Turks from the consequences of borrowing from our unhappy bondholders. Russia, it is true, has too much on hand at present to trouble herself much about anything we either say or do, so long as we do not actually go to war. But we did not hear much from America about damages, either "direct or consequential," till the American war was over; and if we are not more careful than we have been of late, I should say that, when this war is over, John Bull's breeches-pockets were likely to be in far greater danger of attack than his Indian frontiers. As his popularity is not on the increase, he need look for no more help from the bystanders than they rendered him on the occasion of the Geneva affair; and as his family at home will certainly not allow him to go to war in such a cause, it is quite possible that his two Pashas¹ may prove costly pets to him. I shall grieve for his losses; but what I grieve for far more is the position of undignified and unhonoured isolation in which he has permitted himself to be placed. It is childish to talk of England as our newspapers do habitually, as if the keys of Continental politics were really in her hands. The greatness of England is not there. But a State that is great anywhere ought to be respected everywhere; and it will not be by parading her jealousies, her anxieties, and "her interests" before the world, and by linking her fortunes with those of a horde of incorrigible barbarians, that England will regain the position which she enjoyed during the earlier portion of my own life, before the great and glorious traditions of the Peninsula and of Waterloo were tarnished by the follies and blunders of the Crimean War and the Treaty of Paris.

¹ Captain Hobart and ex-Colonel Baker, two British subjects, who held important commands—the one in the navy, the other in the army, of the Sultan.

XII.

PROLEGOMENA TO A REASONED SYSTEM OF INTERNATIONAL LAW.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1878.

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THE life of man upon earth is a perpetual and gradual revelation to him of the laws by which that life is governed. It is in this form that the process of evolution, which Mr. Darwin has traced throughout nature, manifests itself after the stage of conscious and responsible existence has been reached. As progressive, this revelation of law is always incomplete. The completion of the revelation would involve the extinction of the subject of which it is an attribute—of the existence of which it is a condition *sine quâ non*. A man with a perfect knowledge of the laws of his own life would have reached the limit of that life itself, and attained to what may possibly have been the original conception of the Buddhist Nirvana. But, be this as it may, his human existence at all events would have ceased; for if his will were coincident and his power coextensive with his knowledge, he would be a god; if they were the reverse, he would be a devil; but in neither case would he be a man.

And what is true of the human unit is true of the human aggregate, of the life of the State as of the life of the citizen. Lastly, it is true not only in its ethical and intellectual, but in its physical aspects. The laws of health and wealth are progressively revealed, and man becomes gradually acquainted with physics and physiology, hygiene and economics, just as he becomes acquainted with ethics, politics, and jurisprudence. Law in every direction, as Butler said of the universe, is thus a scheme imperfectly comprehended; and to whatever department of science we betake ourselves, and whether we study that department with speculative or practical objects, the first lesson which we have to learn and to teach is a

lesson of humility. We must be contented to know in part and to prophesy in part, and rejoice in the hope that as that which is perfect comes, that which is in part shall more and more be done away.

Such is the attitude towards objective and absolute law which science has imposed on Occidental thought, and in compliance with which dogma is being rapidly superseded by doctrine even in theology.

In politics and jurisprudence it is on the same ground that the philosophical point of view has taken the place of the theocratic, and that men have contented themselves to move gradually provided they move on.

In the East both thought and action spring from an opposite point of view. Theocratic systems, like those under which most Asiatics, more especially those of Semitic race, have lived, and live now, resting as they do exclusively on the authority of direct external revelation, real or pretended, necessarily claim to be infallible, and, as they are assumed to embrace secular as well as sacred affairs, they are necessarily final. The only relation in which mankind can stand to them is that either of acceptance or rejection. There is no progressive movement, no gradual development; and a hard-and-fast line affecting every relation of life is thus drawn at once between the faithful and the unbeliever. If the unbeliever accepts the faith, no inquisitorial scrutiny need be made into the internal processes by which he arrived at it. External revelation will be charitably assumed to have reached him; and he may become a Pasha without going to the Confessional, or even being very constant in his visits to the Mosque. But the moment that he fails to give whatever external manifestations of his faith may be regarded as sufficient, there can be no compromise with him. He cannot be allowed to come to it gradually, or to accept it partially as it manifests itself to his understanding or takes root in his heart. He must receive it all at once, unhesitatingly and completely, on pain of being dealt with as the enemy of God. His only choice is Islâm or the sword.

It was on this ground that I sought to explain, in my introductory lecture last year, the defects of the *Codén* as the basis of any political system which was to claim international recognition. The ethical creed by which the conduct of one Mahometan to another is regulated—with the rather important exceptions of polygamy and slavery—does not perhaps differ very essentially from the ethical creed which nature reveals to the rest of us. But the moment a Mahometan comes in contact with the external world, this creed not only ceases to act, but is positively reversed. "What was affirmative becomes negative, and what was negative becomes

affirmative. The premises from which a Mussulman deduces his rules of conduct to an unbeliever are precisely the converse of those by which he deduces his rules of conduct towards a believer; and if he promises, by international treaty or otherwise, that his conduct shall be the same, he simply promises to violate the *Corân*." "It is in this consideration that we are to seek for an explanation, and even for a partial justification, of what we often talk of as the inconceivable obstinacy and bad faith of the Turks."

What I then said of the *Corân* I now extend to all theocratic systems, or systems resting on the assumption of an external revelation of the positive laws by which God intended that the life of man should be governed in the shifting scene in which He has placed him. It is as true of Judaism, both ancient and modern, as it is of Mahometanism; and we find accordingly, that in announcing the principles in accordance with which the life of humanity was to advance, Christ, though Himself a Jew, abandoned entirely the Jewish point of view. He declared the theocracy to be abolished, and alienated His countrymen, as He has done the whole Semitic world ever since, by preaching ethical discourses. It was to doctrine, not dogma, that He compelled them to listen; and if we desire to trace the spirit of His teaching elsewhere, we shall find it, not in the spurious revelations to which other branches of the Semitic race lay claim, but in the natural revelations of human consciousness, of which the Indo-Germanic race has always been more conspicuously the channel. The Vedic hymns, the Zendavesta, the Dammapada, the Dialogues of Plato, and the Ethics and Politics of Aristotle, all more or less definitely foreshadowed the Sermon on the Mount, whereas the *Corân*, and, I fear, also the "Asian mystery," which we ourselves are striving to unfold, are in direct contradiction to it.

The progressive character which I claim for philosophical doctrine, as opposed to theocratic dogma, involving as it does the incompleteness of the former at each stage of its development, is regarded by what I may call the Anglo-Semitic school of politicians as so great a defect as to drive them to accept the "Arabs" as the sole recipients, and consequently as the sole expositors, of absolute law. Who these "Arabs" are is not very clear, for they are alternately made to include, and to be included by, the Jews, and are not always very sharply distinguished even from the Turks. But from Europeans, at any rate, they are marked off by a very tangible distinction. "God has never spoken to a European?—Never!" "Let men doubt of unicorns; but of one thing there can be no doubt, that God never spoke except to an Arab." "That is the truth; the government of this globe must be divine, and the impulse can only come from

And with a view to the realisation of this divine lesson of our own beloved Queen, who unfortunately is not perfect, is to be "magnetised" and "persuaded to transfer away from London to Delhi, to found the greatest empire

—existed"—and "to get rid of the embarrassment of her science." I am far from pretending to determine the line which with which recur in the brilliant fiction from which I have quoted

No Scotchman, it is said, can understand a joke; and a Scottish professor may perhaps be pardoned if he cannot find fun in jesting which has already imposed taxes on Great our own fair share of which, if judiciously applied to the ment of our higher schools and universities, would probably made Scotland in a very few years the most learned country world.

But let us return from this involuntary digression into the hidden field of "practical politics"; and if, not being "Arabs," must not lay claim to supernatural enlightenment, try what we make of the natural enlightenment which science may vouchsafe

I have said that it is the incompleteness of the results of scientific investigation in jurisprudence and politics which begets one class of minds a craving for mystical guidance, and I might have added that it is the same feeling which sends others, less imaginative but not more profound, to grope ignobly amongst facts and figures, without scheme or method. In international jurisprudence, above all, fanaticism and empiricism are alternately substituted for those honest and rational processes of observation and induction by which progress is made in other directions. Ethics gives place to mysticism or utilitarianism, right and might become the watchwords of opposing champions by whom their ultimate identification in Divine omnipotence is alike unperceived, rhetoric and declamation are substituted for logical sequence of thought and grammatical perspicacity of speech, and political discussion ends in vulgar and illiterate wrangling.

But is partial or incomplete knowledge necessarily unreliable knowledge? Can the security of no stepping-stone be trusted till the flood be past? Must the goal remain invisible till the race be run?

The distinction between incomplete knowledge and untrustworthy knowledge is very well understood in the physical sciences, and hence the unfaltering steps with which they march along from discovery to discovery. In physics and astronomy, in chemistry and physiology, in geology, botany, zoology, and even entomology,

¹ From Lord Beaconsfield's *Tancred*, pp. 261, 269, 393 in Longmans' one-volume edition.

the unexplored regions cast no baleful shadow of doubt and uncertainty over the provinces which have been measured and mapped. Ascertained facts are not facts the less because there are facts behind them, or beyond them, which have not been ascertained; and solutions legitimately obtained are not invalidated by the existence of problems which are unsolved, and perhaps insoluble. All things, it is true, go out at last into mystery—mathematics and physics as well as ethics and jurisprudence. We can no more exhaust space, or time, or number by thought, we can no more conceive either divisibility or indivisibility as ultimate, than we can explain the nature or origin of sin, or reconcile Divine omnipotence with human responsibility. But up to the borders of mystery science encounters within the sphere of material existence no obstacles which are necessarily insuperable, and no doubt attaches to the reality of her conquests. Can we, then, secure no such stable basis of operations as this for the progressive conquest of that individual and ethnological freedom of action, development, and expansion which is the object of politics and jurisprudence, national and international? Are there no ascertained, determined, and established routes in the field of social progress that we can keep permanently open, and along which, without fear of surprise or obstruction, we may convey our material to the front?

Is it inevitable that, in international politics above all, the moment a change of relation manifests itself in point of fact—a progressive State, for example, gets ahead of a stationary or retrogressive State—every principle of human conduct, down to the most elementary rules of morality and material well-being, should be thrown to the winds, and the hideous spectacle be presented to us of soldiers and diplomatists executing a licentious dance of death over smouldering ruins and prostrate millions, in honour of some phantom doctrine of the Balance of Power, or the absolute independence and equality of States which never had a political existence except in the mutual jealousies of those who recognised them? Do motives of exclusive self-interest, jealousy, envy, suspicion, and fear—all that as individuals we brand as most ignoble—become worthy and generous springs of action simply by being transferred to a wider sphere? Is it enough to change the nature of things that men when dealing with nations should clothe with the high-sounding epithet of patriotism sentiments which, in dealing with each other, they would spurn with indignation and shame? When thus propounded in their nakedness these questions will not fail to call forth negative answers. But are these the answers which history gives to them, or which is given to them practically in our own day? I fear not; and did I hold the creed which so many thoughtlessly profess, did I believe international relations to be governed

by no permanent laws,¹ either moral or social, which were discoverable by human reason, I should abandon the study of international jurisprudence in disgust, as an occupation that was unworthy of a rational being or an honest man.

But such is very far from the belief with which the observations and meditations of many years have inspired me. I believe, on the contrary, and I think it can be shown so as to necessitate the belief of those to whom the reasoning is intelligible, that there are necessary and, as such, unchangeable conditions of the life and development of separate communities, just as there are necessary and unchangeable conditions of the existence and development of separate plants and animals: that these conditions are discoverable not only approximately but absolutely, just as the inevitable conditions of life and development in other departments of nature are discoverable; and that when so discovered and enunciated they determine the objects which international law must seek to vindicate in all its departments, and under all possible changes of relations which may result from the progress or retrogression of national life.

It is the presence of these unchangeable conditions and necessary objects which gives to jurisprudence in all its departments, and consequently in the department of international law, the scientific character which I have always claimed for it. The positive laws which result as conclusions from the premises with which this unchangeable element supplies us are necessarily incomplete, because life, as I have said, is progressive in itself, and progressively revealed to us. But the premises themselves admit of being stated with as much precision, and, where the dicta of internal consciousness concur with the teaching of external experience and observation, are almost as unquestionable, as the axioms of mathematics or the laws of thought. It is these invariable premises, coincident as you will find them to be at every point with Christian doctrine, that determine the lines along which the discovery of positive legislation, necessarily variable, must be prosecuted, or, to use language with which scientific jurists are familiar, it is natural law which prescribes the objects of positive legislation.

From these observations it will be readily inferred that the direction in which the system of international law which I shall here present differs from most of the text-books which have appeared since the school of Grotius terminated in the person of Vattel, is that it professes to be, not reasonable only, but reasoned. I am quite aware that this profession will expose it to the suspicion, and draw down upon it the ridicule, of those who arrogate to

¹ See Lord Lytton's address as Lord Rector of Glasgow University.

themselves the character of practical jurists, on the indisputable plea that they are not theoretical jurists. This consideration, however, I shall venture to disregard in virtue of another, viz. —though it be but too possible that, in my hands, scientific jurisprudence may fail to point the way to a realisable system of international law—that empirical jurisprudence, in their hands, has so failed already is a fact which I conceive to be established beyond all hope of contradiction.

The premises on which international law rests being common, as I have said, to jurisprudence as a whole, I must refer you for their detailed enunciation to the treatise on Jurisprudence as a Science of Nature,¹ which forms the text-book to my lectures on natural law. But, at the risk of repetition, it may not be without its uses that I should here gather them together in a few brief propositions, and endeavour to exhibit them in the logical sequence in which, as it appears to me, they come into operation in international law.

1. *Fact is the source of Right.*

The universe having been created by a power that is independent of man, and being governed by a power that is irresistible by man, must be accepted by man without question. The rectitude of its laws is thus an inevitable postulate, and fact and right, existence and the right to exist, in the last analysis are coincident. Ontologically this may or may not be so. That is a theological and metaphysical question with which the jurist is not concerned; but as a psychological dictum I believe it to be indisputable, and, in assuming its truth, I furnish, as it humbly appears to me, a sufficient answer, in logic at any rate, to the allegations of my learned colleague M. Brocher,² to the effect that my system rests on the fallacy that "might makes right." Against a system which assumes the necessary coincidence of might and right, the opposite allegation, that it is founded on the fallacy that "right makes might," would be equally just. Neither of these assumptions is fallacious, indeed, otherwise than as presenting one side only of the truth; and if the rights and the facts of existence presented themselves as phenomena equally tangible, I should be quite as well satisfied with the standing-point of Rousseau as with that of the Roman jurists. But rights, till their coincidence with facts is established, are mere opinions, the acceptance and rejection of which are equally legitimate; and hence the frequency with which

¹ *The Institutes of Law. A Treatise of the Principles of Jurisprudence as determined by Nature.* 2d ed., 1880.

² Member of the Institute of International Law, Professeur à l'Université et Président de la Cour de Cassation de Genève; author of *Cours de Droit International Privé*, etc., etc.

systems which begin by declaring the rights of all men have ended by denying the rights of every man. The jurist has no mission to reconstruct the universe, however much pessimists may be displeased with it. As the apostle of order he must accept the inevitable, trace out and define the laws of its action in detail, and remove from before its relentless wheels the obstacles which they must otherwise crush. It is from this fundamental conception of jurisprudence as a whole that is deduced the fundamental doctrine of international law, the doctrine of the Recognition, *de jure*, of the Existence of the State, *de facto*.

By thus placing the doctrine of Recognition on an absolute basis—the basis, that is to say, of nature, or, as we say popularly, of the nature of things—we give to international law from the outset the character of a doctrine of rights, and get rid of all the nonsense that has been talked and written about voluntary concessions, imperfect obligations, and the *Comitas gentium*. There is no intermediate ground between right and wrong, without the State any more than within the State, on which human caprice can jurally disport itself.

2. *Fact is the source of Duty.*

Duties differ from rights only in the point of view from which they are regarded—they are rights seen from the objective side. Every fact, then, which founds a right founds a duty which exactly corresponds to the right. In international relations, as in all other relations, the doctrine that rights and duties are reciprocal and co-extensive is thus an inevitable and unchangeable maxim; and as its logical consequences, it cuts off from the separate State the right of self-isolation, negatives the doctrine of absolute non-intervention, and gives both to public and private international duties the character of *debita justitiae*.

3. *Fact is the measure both of Right and Duty.*

As water in a tube will not rise above its source, so neither rights nor duties can be carried by enactment, treaty, or any other contrivance, beyond the facts in which they originate. International law can no more create a State, add to it, or diminish it, than it can create a man, or increase or diminish his stature. Be the State great or small, strong or weak, international law takes it as the fact may be, and recognises it accordingly. This proposition negatives the doctrine of the jural equality of States which are in fact unequal, and lays the foundation for the first novelty which I have ventured to introduce into this system—the doctrine of Relative Recognition. When I speak of it as a novelty, I speak of

course merely of its application; for it is neither more nor less than the old Aristotelian distinction between absolute and relative equality, which in its bearings on jurisprudence generally I have dwelt upon in the treatise to which I have already referred. But when applied to the doctrine of Recognition it becomes fruitful in results, and indicates the theoretical solutions of many problems which have hitherto been regarded as insoluble. In international as in national politics its practical realisation is surrounded with difficulties which I am far from having the vanity to suppose that I have removed. But it is surely well to have indicated and emphasised a condition, hitherto overlooked, which is inseparable from a just appreciation of the relations of States, and the recognition of which would give to international organisation a reality otherwise hopeless. Whilst conceding to the great Powers the preponderating rights which the facts of their greatness assign to them, it would save the minor States from the practical exclusion from international transactions to which they are doomed by the insincere recognition of their jural equality, and enable them to vindicate for themselves the measure of influence to which they are entitled by the facts of their existence as separate international entities. The partial recognition of semi-barbarous Powers would cease to be the cruel and hollow farce which the pretended recognition of Turkey by the Treaty of Paris of 1856 proved to be. If quality as well as quantity, or mere extent of State existence, could be measured, States like China and Japan, which existing arrangements altogether exclude, might come gradually within the sphere of international rights and responsibilities. Half a loaf is better than no bread, and if the principle of recognition *quantum valeant* were admitted, States which had no claim to a bellyful might secure a mouthful. Even protected States and Colonies, which for the present are incapable of separate political existence, might see their way to ultimate recognition.

4. *Perfection in relation, not in the subjects related, being the object of Jurisprudence as a whole, is the object of International Law as a portion of that whole.*

In this limitation of the sphere of jurisprudence, by which it is distinguished from ethics, we have the measure of the jural action and reaction of recognised States. It negatives, in their case, all interference with internal government, whether that government have reference to temporal or spiritual concerns. It forbids all propagandism, both political and religious, subsequent to and during the subsistence of Recognition. But it leaves

wholly untouched such questions of fact as whether professions of communism, socialism, or Mahometanism, as immoral and as such anti-political, be or be not grounds on which Recognition ought to be withheld or withdrawn, and States which profess them relegated to the position of international pupillarity. These are questions of politics, economics, ethics, and theology which it is the duty of statesmen to solve by the light of these sciences, but with which international jurists and international jurisprudence are not concerned.

*5. Perfection in relation is freedom of separate action, not from
but through the subjects related.*

This principle, on which the positive school of jurisprudence rests, finds expression, as regards the relations of States, in mutual obligations to aid in the adjustment of those relations in accordance with facts. To assert or develop its own freedom of action is the right and the duty of every separate community; and the relation which gives the fullest scope for the exercise of this right is the perfect relation between separate communities. To recognise this assertion and to aid this development is the duty and the right of all the communities which recognise their several existence as States. The freedom of each is the object of all, and considered simply as jural entities it is their only object. They are bondsmen to each other that all may be free, and, paradoxical as it may seem, freedom is thus a relation of mutual dependence. Absolute freedom belongs to God only, and is excluded by the conditions of creaturely existence, whether corporate or individual. But freedom being the end, and dependence the means, and jurisprudence an ideal economist, the end justifies the means only to the minimum extent requisite for its attainment. This explanation supplies an answer, the adequacy of which, in principle at any rate, will not I believe be disputed, to the allegation which has been brought against my system by so eminent a critic as Dr. Bluntschli—viz. that it sacrifices the freedom of separate States. Its sole object, on the contrary, like the object of jurisprudence generally, is the vindication of their freedom up to the point at which freedom becomes suicidal.

Such then, in rough and hasty outline, is the discovered country of international law which the science of general jurisprudence has mapped out for us. From this natural Pîsgah we can see that it is no floating mirage of human passions and fears, but a land of promise resting on Divine decrees more stable than the hills.

But what of its conquest? Along what lines are we to seek

for the concrete realisation of those inalienable rights and inevitable duties which God and nature have imposed on separate political communities? Now here, with Grotius and the elder jurists—in place of groping amongst innumerable transactions, dictated too often by motives of supposed self-interest, or at best of immediate convenience, in circumstances which can never recur, and many of which, even with reference to the objects which they sought, were mistakes at the time—I have turned for guidance to a department of jurisprudence in which positive law has long been a reality in all civilised States, and tried to discover to what extent the example of its success might here be turned to account. I speak of course of municipal law.

It is quite true that the analogy between the *persona* considered as the municipal unit, and the State considered as the international unit, is an imperfect analogy. There are many directions in which it altogether breaks down, and any guidance which it seems to afford us must consequently be received with extreme caution. But all analogies are imperfect in this respect, and yet the whole of our reasoning from experience, which with the vast majority of us is the only reasoning of which we are capable, is reasoning from extremely imperfect analogies between past and present occurrences. The question is not, Are the conditions of the two problems the same?—for that may always be answered in the negative—but, Do they resemble each other closely enough for the old solution to be so modified as to apply to the new problem, or to suggest an analogous solution which may be applied to it? Now it was this question which the elder jurists asked themselves, more or less consciously and precisely, with reference to the new international relations which they wished to define and the old municipal relations which the civil law of Rome had defined already. Did the existence and development of the separate political entities which were springing up indicate the existence and progressive growth of jural rights and duties, in any degree corresponding to the rights and duties which centred in the *persona*, individual or corporate? Did the municipal law of contract find its analogue in the treaty-engagements of States? Were the laws of occupation and prescription common to both spheres? These and similar questions seemed to them to admit of answers partially affirmative; and the realisation of the doctrines of general jurisprudence was thus prosecuted to new results along well-trodden routes. No doubt these analogies were often assumed by the civilians to be closer than they were, and international law was hide-bound by the maxims and distinctions of Roman jurisprudence. It was long before the *jus gentium* expanded into the *jus inter gentes*. But the notion that, as in

dealing with international relations they were still dealing with human rights and duties, the definitions which they had received in one class of relations might throw light on those which must be given to them in another class of relations, though differing considerably, was, I believe, a true notion. It is a notion, consequently, on which I have not hesitated to fall back. Whether in dealing with the normal or abnormal relations of states, its application will be found to be the chief distinction, in point of method, between the treatise referred to and most of those which have appeared in recent times.

But whatever might be the value of this proceeding within the sphere of science, the question whether or not it could help us in the sphere of practice remained unanswered. It might serve as a guide to the realisation of abstract and unchangeable principles in concrete and fluctuating conditions, in so far as definition went; but could it suggest any means by which these definitions could be rendered authoritative by general acceptance, and measured out and enforced in special cases? Did the municipal factors of legislation, jurisdiction, and execution suggest any corresponding factors in international jurisprudence? To this question, on which the character of international law as a positive system in the ordinary sense really depends, a few hardy speculators, in an irregular way, ventured to return an affirmative answer. But the response of the jurists was, and for the most part I believe is still, negative. A feeble substitute for these potent jural factors has no doubt been attempted to be found in the modern doctrine of arbitration. But arbitration, in its municipal sense, assumes the presence of the executive factor of government at all events, whereby the decree of the arbiter may be converted, if need be, into the judgment of the Court. International arbitration with no such resource was thus outside of the sphere of positive law in the municipal sense, and though I still regard the question of the possibility of international legislation, jurisdiction, and execution as *sub judice* even in a speculative sense, I have insisted on the necessity of striving to found institutions by which corresponding functions shall be performed as the condition *sine quâ non* of the realisation of a system of positive international law. With the object of illustrating my views, rather than of offering practical suggestions for carrying them into operation, I have even gone so far as to elaborate a scheme by which, if realised, this object, as it seems to me, would be attained. This portion of my work having been published in French, under the title of "*Le Problème final du Droit International*,"¹ has called forth some generous and indulgent criticisms abroad, for

¹ See *Institutes of the Law of Nations*, vol. ii. p. 183, et seq.

which I take this opportunity of thanking my distinguished colleagues of the Institute of International Law. Foremost in this, as in all other efforts for the advancement of international jurisprudence, is our venerated father, Dr. Bluntschli, who has published three remarkable articles in the *Gegenwart* (Nos. 6, 8, 9; 9th and 23d February and 2d March 1878), on the organisation of the union of European States (*Die Organisation des europäischen Staatenvereins*). In the general views for which I contended, I am gratified to find that I have Dr. Bluntschli's concurrence. He admits—

1st. The impossibility of conferring on international law the character of a positive system, otherwise than by the action of factors more or less closely corresponding to what, in municipal law, we call legislation, jurisdiction, and execution.

2d. That the realisation of these factors within the sphere of international relations is not necessarily or permanently shut out by any facts or laws inherent in the character of these relations.

3d. That the failure of all previous schemes of international organisation can be satisfactorily explained by their aiming at two impossible objects: (a) The establishment of international arrangements which should be immutable, and (b) The political equalisation of recognised States, whether with or without their equalisation in fact.

As the basis of his own scheme, Dr. Bluntschli frankly accepts the *de facto* principle, which lies at the root of the doctrine of recognition. As to the soundness of this principle, there is, I believe, now no difference of opinion amongst jurists of any account; but in carrying it out, as the fundamental principle of international organisation, and thus breaking with the revolutionary schemes which he criticises, Dr. Bluntschli has had as yet few predecessors. For the most part, it is no sooner stated than it is departed from; and hence the feeble and illogical character of the vast proportion of works of all classes in this branch of jurisprudence.

4th. Dr. Bluntschli further recognises the necessity of conforming to modern conceptions of liberty, by taking account of public opinion within the several States by means of representatives chosen by or from the various municipal legislatures. He thus throws in the weight of his great authority against secret diplomacy and all other devices for the realisation of personal government in international affairs.

So far, I believe, I have the concurrence of my eminent colleague, and it goes pretty nearly all the length that I care for. I did not expect him to accept the scheme which I propounded, and I am consequently not much moved by his allegation that I

have dreamt the English constitution, or rather, as he alleges, the constitution of the United States; whereas he, not unnaturally, prefers to dream the German Bund. It is very improbable that either of them will be found to offer a model which will admit of any close imitation in international relations, but the former has surely as good a municipal pedigree as the latter. On the practical branch of the subject I am far from wishing to dogmatise. That I shall gladly leave in the hands of the "one or more great European statesmen" who, I am glad to learn from Dr. Bluntschli, are not indisposed to undertake it; and I shall only be too well pleased if any poor suggestions of mine should contribute to aid them in their generous labours.

"But all these things I must as now forbear;
I have, Got wot, a largé field to ear;
And weaké be the oxen in my plough."

But the question raised by the 4th proposition, whether the external politics of States shall be governed by their executive or legislative factors, demands some further mention at the present moment. Strictly speaking, it is a municipal and not an international question; yet so inextricably are these two branches of jurisprudence intertwined, that it is a question which threatens, perhaps more than any other, to divide international politicians and jurists into two hostile camps. In the formal conduct of international affairs, it has always and everywhere been the executive which represented the State, and proclaimed what was held to be the national will to the external world. But substantially the question whether, in the performance of this function, the executive acted independently of the legislature, or was simply its mouthpiece, depended on the form of the municipal government of the State. In despotic States, where the legislative and executive factors were centred in a single individual, that individual, personally or through his representatives, spoke directly in his own name. He was the State both legislatively and executively, and what he said the State said, no matter in what capacity he spoke. It is true that the independence of his will was proximate only, not ultimate, and the frequency with which it was controlled by revolutions has always rendered it an unsafe basis for international trust. It is on this ground that in treating of the doctrine of Relative Recognition, I have ranked despotic States lower than constitutional States. Still, when a despotic State has once been recognised, there is no international ground on which its executive, though unsupported by its legislature, can be repudiated as the exponent of its will, and treaties have consequently been not only negotiated but ratified without receiving the sanction, or being brought to the knowledge, of any separate legislative factor. In constitutional

States, on the other hand, the executive, being dependent on the legislative factor, was supposed to speak its words; and these words, from the representative character of the legislative factor, were supposed to be the ascertained will of the nation. The will of the executive was the will of the legislature, and the will of the legislature was the will of the people; and in dealing with a constitutional government external States thus dealt with the nation in its organic totality.

A third doctrine has recently been attempted to be introduced by which the same State may be at once a free State and a despotic State, according to the point of view from which it is contemplated. Whilst its municipal affairs are governed constitutionally, or rather democratically, its international affairs, it is contended, may be, and ought to be, governed despotically. This doctrine, known by the names of Cæsarism, Imperialism, or Personal Rule, inasmuch as it can scarcely ever be in accordance with fact, can scarcely ever merit the acceptance of international jurisprudence. Even in a State in which the executive or legislative functions are professedly united in a single will, that single will is ultimately dependent on the collective will. But where this collective will can make itself felt externally only as the result of a domestic revolution, the executive is independent in a very different sense from the executive of a State which is furnished with an elective system, the very object of which is to control it. The will of the Czar may to some extent no doubt be influenced, even immediately, by the will of the Russian people, but it is controlled by no constitutional power like that which at any moment may dismiss an English Prime Minister from office, and which, at stated periods, brings his tenure of it to an end. These considerations, I think, explain, if they do not justify, the distrust with which secret diplomacy on the part of constitutional Governments is always regarded by despotic States.

If I am asked whether I believe that a cosmopolitan organism, even if realised in accordance with the immutable laws which govern human relations, and so adjusted as to take cognisance of and adapt itself to ever-changing conditions, would continue to be self-acting, and that the course of this world's history would thenceforward run straight? I reply emphatically, No! All that I claim for such an organism, or for any distant approach which might be made to it, is that a wider margin would be thereby reclaimed from the action of those disturbing forces of human passion, selfishness, vanity, and stupidity, the presence of which we must accept as not less permanent than the laws which they violate, or the facts against which they dash themselves. When we speak of man as a rational being, we use an expression which we know to be

only partially true. But man is not wholly irrational, or entirely bereft of what reason he possesses as a citizen, when he deals with interests which transcend the limits of State existence; and I consequently see no ground for doubting that what his partial and fitful reason has accomplished in municipal jurisprudence may be gradually accomplished in international jurisprudence. Extravagant hope is as inimical to steady and orderly activity as groundless discouragement, and it is hard to tell which of the two has acted most prejudicially on the progress of international jurisprudence. After ages of honest and on the whole intelligent effort, the freedom of the individual has as yet been only very imperfectly protected from the inroads of despotism on the one hand and anarchy on the other; and it is vain to hope that the freedom of the State can be secured by a single spasmodic throe of international reason. But if it cannot be accomplished by reason at once, it cannot be accomplished without reason at all. Reason, which in the last analysis is identical with power, is the ultimate factor into which all the proximate factors of progress resolve themselves; and in this consideration we have, I think, a sufficient warrant for our faith in a reasoned as opposed to a haphazard system of international law.

XIII.

THE LAND QUESTION, IN ITS SOCIAL AND POLITICAL ASPECTS.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1879.

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THOUGH bearing the title of Professor of Public Law, as well as of the Law of Nature and Nations, it has been in the latter capacity, without any exception I believe, that in former years I have addressed my class at the opening of the session. Two reasons have induced me to adopt this course. The first is, that there is another professor, and a very efficient professor, into whose hands the *jus publicum*, in its municipal sense and in its technical aspects, naturally falls—I mean the Professor of Constitutional Law and History. The second is, that public municipal law lies somewhat dangerously near to the region of party politics, a region which I have always studiously avoided. On the present occasion the two subjects, in this latter respect, have changed places. We are approaching a general election, the issues of which will mainly turn on the foreign policy of the Government. The question will be raised, whether the recent policy of this country, in supporting the dominion of a Mahometan Power over the Christian races in Eastern Europe and Western Asia, is to be persevered in or abandoned. Alongside of this exciting and agitating topic, on which few men can at present speak with temper and patience, there has sprung up another question of the gravest national concern, which all intelligent and well-intentioned persons in this country are still happily able to approach with calm and dispassionate consideration. I limit this assertion to our own country and to the present time, because in the sister-kingdom of Ireland the land-question has long been that which rouses more furious passions than any other, and it everywhere touches so many traditions and prejudices, and affects the fortunes of so many individuals and classes of individuals, that unless it can be success-

fully dealt with now, it is doubtful whether we ourselves will long be able to contemplate it with soberness. To myself personally, moreover, it is interesting beyond what it can be to the generality of those whose fortunes are not directly embarked in it; for I was born and spent the beginning of my life, as I shall probably spend the end of it, amongst men who were engaged in rural pursuits. In these circumstances my learned colleague, I am sure, will pardon me if I encroach for once on the preserve which I usually abandon to him, and try to look at this topic, not so much from the economical point of view, from which it is generally regarded—a point of view in which another learned colleague, the Professor of Political Economy, may lay claim to it—as in those social and political aspects in which it is not less important to our national wellbeing. To see it aright from any one point of view, exclusively, is indeed impossible; for it is as an economical question mainly that its political and social importance can be measured, and it cannot be solved as a legal or legislative question unless its political, economical, and, as the root of all, its social and moral bearings are kept clearly in view.

The truth of this remark has been terribly emphasised to us by the example of Ireland, where the social fabric has been shaken by it to its foundations, and where, as a political factor, it has frequently threatened to tear asunder the union of the three kingdoms. Yet it is a remark to which, I fear, sufficient prominence is seldom given in this country. If one may judge by the vast preponderance of the purely economical over the social and political topics prescribed for investigation to the Royal Commission which has just been appointed, it would seem that it is as an economical problem almost solely that the land-question presents itself to the Government; and it is in this form, with few exceptions, that it is discussed in the newspapers and other periodicals. In illustration of what I mean, let me mention, at the outset, one single all-important question which seems constantly to be omitted: the question, namely, what system of tenure or mode of culture will maintain the greatest number of persons in wellbeing *on the soil*? In judging of the various arrangements adopted in this and other countries for the distribution of the land amongst its inhabitants, the test is always the amount of produce which they yield, or are supposed to yield, meaning by produce food which is carried away to support the town populations, and not food which is consumed by, or shelter afforded to, the rural populations on the spot. If two farms of equal size, one of which is worked by five men and the other by ten men, send the same amount of grain to the market, a saving of the value of the labour of five men is supposed to have been effected on the former. Against this gain the

cost of the machinery by which, to some extent, it was effected will no doubt be put, but the saving which still remains will be unhesitatingly scored up as pure profit, not to the farmer alone, but to the whole community. The affair, however, is vastly more complicated, as we shall speedily perceive if we trace the history of the five men who were formerly housed and fed on the land. If they emigrate to a colony where land is cheaper, and labour, of the kind to which they have been trained, is more highly remunerated, their condition may be substantially improved; and emigration is certainly the best, if it be not the only, means by which any pressure on the resources of this country occasioned by over-population can be alleviated. But emigration is for the young and the enterprising. Let us suppose that the fate of our five men is the more ordinary one, and that they simply go to crowd still further the nearest manufacturing town. That the occupations to which they go,—supposing them to procure occupation—and the other conditions of existence by which they will be there surrounded, are less conducive to their physical health than those which they have abandoned, is a fact but too well established by the comparative death-rates in town and country which every report issued by the Registrar-General proclaims. The difference in some cases rises, I believe, to a third. But say that it is a fourth: each of these five men loses a fourth of the days which would otherwise have remained to him, and his children lose a fourth of their existence. But the loss, say the admirers of town life, is compensated by the higher wages and increased opportunities of enjoyment and culture which fall to the share of the inhabitants of towns. Though their life is shorter it is merrier. For my part, I doubt very much whether short lives in general are merry ones; for what shortens life is disease, and disease is not a source of additional merriment to those who experience it. Then as to the higher culture and greater general intelligence of the town populations—this I altogether deny; and no one will, I think, assert it who knows the variety of resources and the vast amount of handiness which is exhibited by any good rural labourer, or efficient country tradesman, as contrasted even with a highly skilled town mechanic. Beyond his own trade the latter generally is as shiftless as an infant in arms; whereas the former knows half a dozen trades, not very perfectly, it may be, but to an extent that is often surprising and gratifying to those who have occasion for his services, and which greatly develops his own faculties. He can handle all kinds of tools; he knows about animals and plants and soils and minerals, as no board school could ever teach him; and, whatever his subsequent occupation may be, he is a born groom and gardener and forester and gamekeeper. Without entering upon the moral phase

of the question, then, regarding which more might be said, I dare say I may assume that our five men are not likely, themselves, to be gainers either physically or intellectually by any territorial arrangements the effects of which may be to drive them from the country into the town. But if the country is over-peopled, it may be said, does not the rest of the community gain by a process which, by shortening the lives of some of its members, diminishes their numbers? This were a heartless solution of the problem of over-population, even if it were an effectual one. But such is far from being the case; for, by a singular law of nature, the marriage-rate and the birth-rate keep pace with the death-rate, and the diseases engendered by city life generate the victims on which they feed. Even if death were more sudden amongst the town populations something might be gained; but I am not aware that the period of inefficiency which precedes dissolution is shorter in the town than in the country, or that the means of supporting decrepitude or alleviating suffering are greater. Poorhouses and hospitals are not peculiar to towns; but even if they were, the best-appointed hospital and the best-governed poorhouse are sorry substitutes for a cottage of one's own, with the squire's mansion or the minister's manse within cry; and notwithstanding all our charitable efforts, more men and women probably die unfed and untended in the Cowgate every year than in all the rural districts of Scotland.

But I must not pursue this subject further. I have said enough to show you the grounds on which I deplore the rapid depopulation, not of the Highlands alone, but of the Lowlands also, to which the Registrar-General's reports, and the roofless cottages which we see in every locality, bear mournful testimony. We have no deer-forests in the Lowlands, it is true; but other causes are at work which produce similar effects. During the ten years which elapsed between 1861 and 1870 we are told that "a number equal to nine-tenths of the persons born in the rural districts emigrated from them, to seek a subsistence abroad, or in the principal and large towns"; and that the latter was the destination of most of them is plain enough when we learn that whereas the whole Scottish emigrants, during these ten years, amounted to 157,838, the town populations were increased by no less than 239,736 persons.¹ That this evil, if evil it be, has been occasioned by those arrangements for the distribution and cultivation of the soil which have been here developed to an extent unknown in any other country, is a fact which I believe I need not hesitate to assume; because the saving of manual labour which results from them is the main ground on which they are defended by their advocates.

¹ Supplement to the Registrar-General's Reports of Births, Marriages, and Deaths in Scotland during the ten years 1861-1870, pp. 4, 5.

And as I assume the cause, I will concede the importance of the result. If agriculture is to be regarded as a mere food-producing process, apart altogether from the interests of the rural population, so far from disputing the reality of the gain effected by the saving of labour which results from the present system, I will even go the length of admitting that, if the soil of this country is to compete successfully with the soil of the Colonies and of America in this respect, it can only be by a further development of this system. We must go on encouraging the accumulation of land in the hands of single proprietors; we must increase still further the size of our farms; and we must, more and more, trust to the use of machinery and the application of artificial manures and the offscourings of towns. The whole land must be converted into one vast food-manufactory. But that competition will be successful, even with such aids as these, I greatly doubt. The application of machinery to agriculture is not peculiar to this country, and is likely to progress in America, in our own Colonies, and even on the Continent, pretty nearly as rapidly as amongst ourselves; and as the use of manures is rendered almost superfluous by the fertility of a virgin soil, and the cost of transport by rail and sea will certainly continue to diminish, it would seem inevitable that the victory in the end must be with the possessors of the broadest and cheapest acres. Land, not machinery and manures, is the first condition of agricultural success. No superiority in skill, or industry, or capital will supply the want of land; and what we cannot increase is the area of our sea-girt home.

But it is not the question of the relative food-producing powers of this and other countries which I wish at present to raise, for that is a question on which the Commissioners who have been sent to America and to Canada will, no doubt, furnish us soon with valuable information, and which involves many considerations with which I am not competent to deal. The question which I wish to ask you, and which I think is too rarely asked, is this—Is the production of food the only, or indeed the main, object which we ought to have in view in determining the arrangements by which the soil of such a country as this can be made to contribute most largely to the wellbeing and happiness of its inhabitants? If we can get food that is cheaper, or even equally cheap, elsewhere, are we wise in devoting our own limited area, at the sacrifice of every other object, to the production of food? If man does not live by bread alone, are there none of the other conditions of his human existence which he may get out of his native land, which no other land will yield him on such favourable conditions? Now I think you will find an answer to this question without much difficulty, if you will take a stroll through the suburbs

of this or any other great city, and meditate on the spectacle which you will there behold. To the south of Edinburgh, for example, in the Morningside and Newington districts, there are many hundreds of acres of rich and fruitful soil, with a southern exposure, and possessing every conceivable facility for manures and markets, that grow no food at all. Not an ear of corn waves on the whole of them; and the few vegetables and the little fruit they produce are costly luxuries, that could be bought for half the price from the greengrocers. Or take a sail down the Clyde from Dumbarton to Rothesay, and look more particularly at the northern bank. The green fringe between the river and the purple mountains is rich and populous beyond all precedent in its history. Every acre of it is worth more than the best corn-land in the Lothians, and yet it is not a corn-growing land at all: on the contrary, it is a corn-consuming land; and if you wish to see where the food comes from that covers its bountiful tables, you must look out into the broad Atlantic which washes it in from beyond the Tail of the Bank. Now in these localities which have become, primarily, the abodes of men, we have a type of what, more or less, if I am not greatly mistaken, must be the future of all the localities of a small and populous country like this, which draws its wealth, with exceptional facilities, from half the world. It is not "Glasgow Manure," but Glasgow itself, and all our other crowded centres of wealth, which we must spread over the land; and it is not food, but appetite, renewed vigour and elasticity, mental and physical, which these centres of national life must draw in from the circumference.

But is the whole of Scotland, you will say, to be converted into villas and country residences for the town populations, to be occupied only during a portion of the year? Or are the town populations to be planted permanently in the country, at what must necessarily be to them a loss of income? Neither process, I reply, will act exclusively, but both I believe to be progressive processes; and it is to their joint action, more than in any other direction, that, I think, we must look for the maintenance of the value of landed property, and the repopulation of our rural districts. Rural tastes have always been one of the strongest characteristics of our countrymen, and the tendency of the possessors of realised wealth, if not in the first generation, almost invariably in the second or third, is to seek for landed investments. It is this tendency which has raised the price of land in Holland to a much higher rate than it had reached in this country before the present depression began; and in our economical and social just as in our political development we are probably destined to follow our seafaring kinsmen.

Did your time permit, I could state to you many other reasons for the belief which I hold that the residential value of land has not yet, by any means, reached its maximum in this country; but I see no ground of hope that either the possession or the cultivation of land for mere food-growing purposes will ever again become a speculation by which men may grow rich. In such a country as this the land is for those who are rich already, i.e. for those who are rich in proportion to their wants. Rents of course must fall to the point which will render farming a moderately remunerative occupation; but the proprietors of the soil must be contented to accept, as part-payment for their investments, the luxury of living in the country, and the security of possessing the only commodity, on this side of time, which neither moth nor rust can corrupt, and which thieves, even in Ireland, find it difficult to steal.

So far, then, from looking for relief from the depression which at present weighs on the landed interest in the abolition of the class of wealthy landowners, I believe that relief can come only from an indefinite multiplication of this class. But wealthy landowners and great landowners are very far from being synonymous terms. A landowner with ten acres may be rich, and a landowner with ten thousand acres may be poor; and in dealing with this matter, at all events, I believe we must accept the hard saying of Mr. Tennyson's Northern Farmer, that "the poor in the loomp is baad." It is neither great lairds nor small lairds, then—neither territorial magnates nor peasant-proprietors—that we must seek to breed by our land-laws, but lairds who are rich in proportion to their acres. It is all one whether their riches be the result of extraneous occupations and investments, or of frugality, industry, and moderation exercised on the land itself. A man who lives well within his income is rich enough to be a landowner, in the sense in which I here speak of riches, whatever the extent of that income may be, and from whatever source or sources it may be derived; and if by any change of our land-laws a class of peasants satisfying this requirement seems likely to be produced, that change, I think, merits the most favourable consideration. The fact that frugality is pre-eminently the virtue of this class in other countries, whereas prodigality is pre-eminently the vice of the whole of the lower classes in this country, furnishes another argument of no slight weight in favour of the experiment.

But there is an objection of another kind to the introduction of the system of peasant-proprietary which I am sure will be fatal to it for many years in this country. Very few persons, either of the lower or higher classes, know anything about it; and the vehemence of the prejudices which have sprung up against it is so great as to deprive many otherwise sensible persons of their reasoning

powers altogether the moment it is mentioned. They will not listen till it is explained to them, and they themselves mix it up with the crofter question in the Highlands and the tenant question in Ireland, and with Communism in France and Pessimism in Russia, and talk and write such a Babel of nonsense about it that all that can be done in the meantime is to stop our ears and stuff our wastepaper-baskets. Nor are its advocates one whit more rational than its opponents; for, without shirking the question at all, it is easy to demonstrate that the expectation that it will meet the depression which at present weighs on the landed interest cannot possibly be realised. Whatever may be the merits or demerits of the system for food-producing purposes as contrasted with that which at present prevails, the peasant-proprietor in Scotland, viewed as a producer of food for exportation from the land, will stand to the peasant-proprietor in America precisely in the same relation as the great proprietor in Scotland to the great proprietor in America; and if the Scottish peasant pays as many pounds for his soil as the American peasant pays shillings, it is impossible that they can compete on equal terms. If the object of peasants is to become rich by the production and exportation of food, they, like their betters, must go themselves, or else send their means elsewhere. They must emigrate, or invest in colonial mortgages. But there is no reason why a peasant who is rich in proportion to his wants should not hold land in Scotland just as he holds it in Holland, or Belgium, or France, or Switzerland, or the Channel Islands; and if he will do so contentedly, and teach to others the virtues of frugality and contentment which are elsewhere exhibited by his class, we shall all be his debtors.

It is to a multiplication of greater proprietors, however, whose wealth is only partially invested in land, or at any rate in land in this country, that I rather look for the maintenance of the value of land amongst us, and I hope to see them grow yearly, from the feuars of roods to the founders of peerages. Nor does it appear to me that, for the realisation of this anticipation, any very serious changes are demanded either in our laws of inheritance or in those which regulate the relations of landlords and tenants. I regard the conflicts of interest to which these relations give rise as inseparable from the relations themselves. They are not caused by legislation, and no legislation will cure them. "A terminable lease," as I have already said in this Journal,¹ "whether long or short, is essentially a bad tenure to begin with; and it has further the very grave fault that it gets worse and worse the longer it lasts. Every year that passes takes from its value, diminishes the interest of the tenant in the subject, and renders him less and less willing

¹ See *Journal of Jurisprudence*, May 1879, p. 250.

to expend his capital, his skill, and his affections upon it. Ceasing to cherish it as a home, or even to care for it as a residence, his whole interest in it soon comes to consist in the profit he can take out of it, or the loss he can escape in consequence of retaining it, during the remaining years of his lease. And this is the very opposite of the landlord's interest. Landlord and tenant are thus, as some one has said, in the same boat, but they are pulling in opposite directions; and it is no wonder that the bad relation which both parties honestly deplore should subsist between them. They may be good friends, and no doubt often are in spite of this relation; but the whole effect of the lease is to set them by the ears; and we know how often they get quarrelling about game, and trespass, and roads, and drains, and fences, and fixtures, and anything and everything that may turn up. I do not believe that any enactment about payment by the landlord for permanent improvements by the tenant, even if it amounted to Tenant-Right in the fullest sense ascribed to it in Ireland, would cure this evil. The tenant would not expend on the subject, whilst it belonged to a landlord who might eject him if he chose at the end of his lease, a shilling beyond what he felt sure he would recover; and the landlord would not expend what he felt was to be for the profit of a tenant whose rent he could not raise till the lease expired. Above all, the practice of farmers renting land beyond what their capital enables them to cultivate with profit would continue; and farming would not become an occupation in which men of capital or culture would willingly engage. The valuation of permanent improvements, and still more of improvements partially exhausted, is, moreover, always a very difficult matter, and both parties are rarely satisfied with the award."

On these grounds, then, whatever the extent of holdings may be, I am deeply persuaded of the great advantages of absolute ownership, or at all events of permanent tenure, over tenancy in its present sense; and I sincerely trust that the processes which are at work in other countries for transforming the latter into the former may meet with no impediments amongst ourselves. Any laws which have that effect ought, in my opinion, to be immediately repealed. But to go beyond this would be to shake the whole fabric of society, and I do not think it will carry us far. Land can never be honestly taken from its present owners below its market-value, and at its market-value they are already offering it for sale in abundance. The land market is full to overflowing, and the price has fallen beyond all precedent. All that is requisite to bring the general wealth of the country in contact with the land is that men of all classes, and women too—for the ladies are by no means blameless in this matter—should moderate their

expenditure in other directions, and learn to practise, in their varying grades, the self-denial which they admire in the modest landowners of Continental countries. There is no need for interfering with the relative preponderance of great hereditary estates; and to talk of "breaking them up" by some change in the law of inheritance, and distributing their fragments amongst new proprietors, is to talk nonsense. It is a result, were it honestly attainable, which very few persons in this country ever desired, and which at no former time was less desired than at present, when many of the holders of these estates have so nobly sacrificed their means to alleviate misfortunes which they did not cause, and which, in so far as they were not inevitable, were caused by that restless and grasping spirit of mercantile speculation which we, like the Dutch, I hope, shall gradually outgrow. No other landed gentry was probably ever as popular as our own; and the bigger they are, the more the big farmers at any rate like them. But are the interests of the gentry themselves the same as those of the big farmers in this matter? Is not their security for the future, and their social and political influence for the present, prejudicially affected by the very magnitude of their possessions, and the consequent diminution of their numbers and of the numbers of the rural population who are their natural adherents? The accumulation of separate and often distant estates in the hands of single proprietors leads to that merely nominal proprietorship, and that mechanical farming for speculative purposes, which weakens the position of the gentry without putting any other substantial class in their place, and deprives the landed interest of its importance as a factor in our national life. But the remedy, which no legislation can justly force upon them, is in the hands of the great landowners themselves. Let them voluntarily divide their estates amongst their children till rights of property and facts of possession, occupation, and enjoyment come together, and we should soon have a numerous and powerful gentry that would hold their own without the help either of faggot-votes or foreign wars. Their present policy, however, is the very converse of this; and if the amalgamation of separate farms has covered the land with ruined cottages, the amalgamation of separate estates has been not less destructive to mansion-houses. In Fife subdivision of property has always existed to a greater extent than in most of the other counties of Scotland. Fife is exceptionally populous, and the social life of the county is proportionately rich and varied. Yet in the district of it in which I live, which is one of the most populous and subdivided, there are three country-houses, within three miles of each other—not counting the one which I have partially repaired—that are going, or have gone, to ruin within the present century.

Not many miles further off there is a fourth in the same condition, to the substantial comforts of which, at no very distant period, I can myself bear witness. And when I say "houses," I mean of course not houses only, but offices, gardens, pleasure-grounds, policies, and all the other adjuncts of complete family residences. All these places have been bought up by neighbouring proprietors, and are in process of being added on to their already extensive estates. The lands, it is true, are still there, and in most cases the trees and coverts have been preserved for sporting purposes. But their character as separate residences, or as residences, indeed, in any sense, is gone. Their domesticity, so to speak, has been annihilated. There are so many warm hearths and so many wealthy, numerous, and cultivated households fewer in the East Neuk; and all that has come in place of them has been an accession of territorial importance to the families that remain, of so slight a kind as to be scarcely noticed by any one, either in the district or anywhere else.

Now let us analyse this process of territorial amalgamation, and try if we can distinguish between the elements in it which were inevitable and right, and those which, if not wrong, were certainly unfortunate, and might possibly have been avoided. That those who grew rich should buy out those who relatively, at any rate, had grown poor was inevitable and right. If there was any fault at all it was probably on the part of the sellers, who, had they been more frugal and energetic, and less vain and self-indulgent, might possibly have retained their hereditary acres. On the part of those who bought there was no fault at all; for they paid the full market-value at the time, and more than the lands would bring were they to sell them now. Still there was waste; for property of great value has been destroyed, the county has been depopulated, the social life of the district has been impoverished, and the "greatest happiness of the greatest number" has been disregarded. It was right that the places should be sold, but it was wrong that they should be destroyed; and the question which concerns us here is whether or not the destruction, like the sale, was inevitable. Now there were two means, as it seems to me, by which it might have been averted. Had the passion for high returns been less, and the love of secure investments been greater in the community generally, these estates might all have been purchased, at still higher prices, by separate persons; and some of the victims of the City of Glasgow Bank would in all probability now have been prosperous Fife lairds. Or had the neighbouring squires who did purchase them consulted what I believe to be the true interests of their families, and of their class, they might have planted in them cadets of their own,

who, like suckers from the parent-stems, would in time have grown into stately trees. It is in a return to the patriarchal, as opposed to the plutocratic, conception of grandeur on the part of the aristocracy, and indeed of all the possessors of realised wealth, that we must look for that increased interest in the land of this country which alone can sustain its value when its cultivation for food-producing purposes ceases to be remunerative. Whether this object would be promoted by the abolition of the laws of primogeniture and entail is a very difficult question. The point is one that depends on a principle which we must study hereafter, and which for the present I can only indicate, *i.e.* that real substantial proprietorship being dependent on actual occupancy, the proprietary powers of the individual are limited, and that a family may hold, really and substantially, an amount of property which when centred in any single member of it can be held only nominally and fictitiously. Possession is proverbially said to be nine points of the law, and possession implies occupation by the possessor himself. A mere title-deed, till strengthened by personal possession, is like a flag planted on an unoccupied territory; and if we wish to convince ourselves of the feebleness of the resistance which it offers to the present tendencies of positive legislation, we have only to reflect on what would be the consequence if all the title-deeds in Scotland were collected in a single charter-chest. Can any man doubt that we should have compulsory redistribution, in some form or other, the very next session of Parliament? Now an "eldest son" can no more swallow up his own family than he can swallow up all the families of the land. But equality, whether of possessions or of positions, is as little realisable within the family as beyond it; and I see no reason why one member of a family should not be selected to act as its centre, or any better principle of selection than that of primogeniture. If titles of honour are to be hereditary they must follow some law of descent, and for them at any rate no other seems so eligible as that of their transmission to the eldest male. It is not the abolition of the law of primogeniture, then, but its modification which seems the appropriate remedy for the evils we have discovered; and if they are to be dealt with legislatively at all, a prohibition might be enacted against any single child inheriting more than twice, or, in the event of his being a peer, three or four times, as much as any other member of the family. The effect of such an arrangement, I believe, would be gradually to diffuse, not the wealth only, but the personal influence of the great landed families much more widely, and to relieve them from that position of impotent isolation into which, quite involuntarily on their own part, they so often drift. Many more of them than at present would then probably take to the cultivation of their own

lands, and we should thus attain to the conversion of tenant-farmers into proprietor-farmers, without interfering either with legal right or social traditions. As the domestic establishments of the proprietor-farmers would be very much larger than those of the tenant-farmers, the country would be re-peopled; and the only loss would be to the West-end of London, where so much of the wealth and energy of the highest class of Scotchmen is now annually wasted.

I have said nothing, as yet, of the political aspects of this question, but what I have to say will be said in a very few words. Whatever strengthens the social position of the landed interest will strengthen its political position also, because political influences are only social influences acting in a wider sphere. And this is specially true of political influences in the forms in which they must act in this country now, and, more or less, have acted in this and all the other countries of Europe since the French Revolution. That prodigious upheaval obliterated all political class-distinctions and established a fictitious political equality which never corresponded, or could correspond, with the social facts of any community whatever. The consequence has been that social influences have now to assert themselves politically without the help of any political organisation at all. All direct recognition of the organic structure of society being denied politically, social influences, whether of classes or of individuals, which rise above the lowest stratum of political life must simply "make themselves felt," as it is said, indirectly. Now the extent to which the landed interest will make itself felt will depend mainly on two conditions—the number of its representatives and their personal presence in the localities in which their influence must act. The importance of the subdivision of estates and of the personal residence of proprietors for political purposes thus becomes apparent. Neighbouring proprietors, too, more especially if they are brothers and cousins, stick closer together than landlords and tenants, and hence the political importance of the substitution of proprietorship for tenancy, and the value of the maintenance of the *gens*. Where men are bound to each other by the ties of kindred, neighbourhood, and common interest, the absence of political sympathy will always be rare; and a united family will seldom fail to act as a political momentum in the district in which it is located, to an extent which is impossible to any single member of it, even when he chances, by a happy accident, to be its most gifted man.

XIV.

OF THE IDEA OF THE FAMILY IN
MODERN SOCIETY.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
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THE subject with which I desire to occupy your thoughts during the first hour of this session is "The Idea of the Family in Modern Society." It is a subject so interesting and so vast, it branches out in so many directions, and admits of being treated from so many points of view, that I cannot afford the time that would be necessary were I to attempt to put aside in detail the points of view from which I am not to treat it.

Generally, however, I may state that it is not my intention, on this occasion at all events, to inquire into the origin of the family, or to criticise the various theories with reference to its development which at present engage so much of the attention of the learned. Some of these theories are founded on hypotheses which, if true, would degrade humanity, not only below the ordinary condition of savages, but below that of the other higher animals. In proof of this allegation I need go no further than to Mr. Herbert Spencer's celebrated four stages of the development of the sexual relations. They are so frequently repeated and so industriously commented on by his disciples that most of you are no doubt familiar with them, and those who are not will find them enumerated in his *Sociology*, vol. i. p. 704.

I am far from denying that under the influence of abnormal impulses and adverse conditions of existence, the earlier as well as the later of these stages may have manifested themselves, or may even manifest themselves now. The mistake, as it humbly appears to me, into which Mr. Spencer and his many followers are accustomed to fall consists in regarding these abnormal conditions of existence in the light of institutions which ever had, or could have had, a recognised existence amongst men. The assumptions

on which they rely, when stretched to the extent of warranting such an inference, I believe to be hallucinations begotten of dwelling too exclusively on the dark side of nature under the partial illumination of the midnight oil. Had their ingenious authors mingled more freely amongst their fellow-creatures in the light of day, they would have become acquainted with numberless counter-acting influences, of which apparently they have taken no account. They would have come to see that, apart from moral instincts altogether, love and jealousy were sufficient safeguards against the growth of such customs amongst men and women, whilst they needed only to have consulted the first hen-wife they met in order to be assured that their realisation in the poultry-yard was impossible. The feelings expressed in the proud and tender love-song of the chivalrous Marquis of Montrose are more in touch with all healthy animal nature:—

“My dear and only love, I pray
That little world of thee
Be governed by no other sway
Than purest monarchy;
For if confusion have a part,
Which virtuous souls abhor,
And hold a synod in thy heart,
I'll never love thee more.

Like Alexander I will reign,
And I will reign alone,
My soul shall evermore disdain
A rival on my throne.
He either fears his fate too much,
Or his deserts are small,
Who dares not put it to the touch,
To win or lose it all.

Then in the empire of thy heart
Where I would solely be,
If others should pretend a part
And dare to vie with me,
By them my peace shall ne'er be wrecked,
I'll spurn them from my door,
I'll sing and laugh at thy neglect
And never love thee more.

But if thou wilt be constant, then,
And faithful to thy word,
I'll make thee famous by my pen
And glorious by my sword:
I'll serve thee in such noble ways
As ne'er was heard before,
I'll crown and deck thee all with bays
And love thee evermore.”

Leaving the dyspeptic speculations of the Sociologists behind us, then, let us turn to the family, which springs, as far as may

be, from the "pure espousals of Christian man and maid." Has the idea of the family, in this sense, undergone any serious modification during, say, the last fifty years? Is it likely to undergo any in consequence of the political and social tendencies which are at present in operation amongst us? And in what manner may we best realise it, as it now presents itself to our minds?

It has been remarked, with great truth I believe, that in many directions the law of Status is giving place to the law of Contract, and it is argued that this process tends to the gradual disintegration of the family. Individual rights are being more and more asserted and recognised, and the personality of the female is being vindicated.

In so far as this process consists in the recognition of rights which have always existed, or of rights which have come into existence in consequence of the progress of female education and the wider range of duties which women are in consequence both able and willing to undertake, I believe, on the contrary, that it affords the surest means of strengthening both domestic and political organisation. There is nothing that tears either the family or the State asunder so much as unrecognised rights and suppressed aspirations. They are like dynamite under the social or domestic structure. They may explode at any time, and, sooner or later, they are sure to explode. But rights rest upon and are proportioned to powers, and if we attempt to carry them further than the powers in which they are centred we simply produce confusion. The error will be rectified by the irregular action of the objective power on which we have encroached; but the political, social, or domestic anarchy engendered by the encroachment will be removed only by the legislative recognition of the real relation which we have failed to define. I do not think our legislation, as yet, has gone at all too far in the direction of what is very inappropriately called "female emancipation." The person of the wife, it is true, is no longer sunk in that of her husband; she can hold separate property over which he has no control; and some day, perhaps, she will be able to vote against him at Municipal and Parliamentary elections. But her power to hold separate property in the vast majority of cases will be merely a saving of trouble to her marriage-contract trustees. Her husband, as her nearest, her most trusted, and in general, it is to be hoped, her most trustworthy adviser, will have more control over it, in place of less. In the case of a worthless or improvident husband the possession of this power on the part of the wife, so far from disintegrating the family, may often save it from disintegration. It is only against very weak or very wicked husbands that the new arrangements are likely to act at all, and in their case if they do not act to their

satisfaction they will very generally act for their good. Those of you who get the kind of wives I wish you all, will be only too glad to hand over to them as much of the management of your family affairs as they are willing to accept, and will look even on the family purse-strings as safer in their hands than in your own. When the late Archbishop of Canterbury, after his wife's death, unable to restrain his grief, partially raised the veil which covers the domestic life even of persons in his position, we were told that the officials of the Bank of England often complimented Mrs. Tait on the ability with which she conducted the Archbishop's extensive and complicated transactions. There is many a private gentlewoman in the land who, I am sure, is in the habit of receiving similar compliments from her husband's bankers. As for our wives and daughters voting against us at elections, that is an apprehension which disturbs my rest very little. I dare say it is quite true that they will often persuade us to vote with them, and it is possible that the hope of their doing so may sometimes lead to their being courted by candidates to a troublesome extent. But the inconvenience will not be formidable. The strongest head, whether it be on male or female shoulders, as a general rule will govern the vote, and as a general rule that will be right.

From the growth of individualism, then, and the wider recognition of the rights of the person, I think the family idea has neither yet undergone nor is likely to undergo any serious change.

But what of Communism and Communalism? For we ought to be far more careful in distinguishing between these two conceptions than we usually are.

Of Communism it is sufficient to say that, like Socialism, it is a scheme which is at variance with natural laws, and the realisation of which is consequently impossible. It proceeds on one or other of two assumptions,—either on the assumption that all men are equal and consequently have equal rights, or on the assumption that all men ought to be made equal, and that with a view to this result their rights ought to be recognised by positive law not only equally but as equal. The first assumption is contrary to fact; the second assumption, together with the aspiration which it is conceived to warrant, is at variance with the most fundamental principles of jurisprudence. God has made men unequal, and it is not the function of law to reverse His arrangements by giving equal things to unequal men. It is strange that a truth which, when thus stated abstractly has all the characteristics of a truism, should be constantly set at defiance by those who claim to be the most advanced economists and politicians of our own day, though it was clearly enunciated, and the consequences of failing to recognise

it were expiated on, both by Plato and Aristotle, and assuredly by neither of them for the first time. The watchword of individualism is that God helps those who help themselves, but it is surely an exaggerated conception of individualism which goes over into Communism and teaches the lazy to help themselves to what belongs to the industrious. Communism being an invasion of individual rights is merely legalised theft; and as theft can be legalised only by pessimistic assumptions, which jurisprudence repudiates, Communism falls under the category of crime.

But Communalism,—the holding of property by two or more individuals, or two or more families, *pro indiviso*, and co-operation in its management,—is a very different matter. It does not rest on false assumptions or necessarily encroach on individual rights, and it is possible that by recurring to it we may be enabled to solve some of the most pressing economical problems of the present time. The proprietary relations of the members of the same family always were communalistic. They always laboured in common, and shared the results. Even the patriarchal theory by no means excluded joint proprietorship and co-operative labour. The patriarch was not the sole possessor of the tent. It was not constructed by his single industry or for his single use. When he killed a kid, which his sons had caught for him, he killed it for the family. When he changed his pasture-ground, it was a family migration. The interests of the whole family were so bound up together that for his own sake he acted for the sake of others. He had no choice in doing so, for he could not stand alone. The extent to which his own will shaped the common policy of the family must always have depended on his own character and on the characters of those around him. Within the family, as without it, the weaker will and the more limited intelligence would go to the wall, the amount of friction occasioned by the process being greater or less in proportion to the less or greater perfection of the mechanism, and of the materials of which it was composed. Now it was this inevitable domestic Communalism which, continuing to bind the pastoral tribe as it had bound the pastoral family together, passed over into the village-communities which appear to have sprung up everywhere when the pastoral merged into the agricultural stage of existence. To suppose that individualism took the place of Communalism at this or any other stage of social development is one of those shallow notions by which history has been chopped up into fragments till all life has gone out of it. Individualism and Communalism have always existed, side by side, both amongst civilised and barbarous men. They are manifestations of those centralising and decentralising tendencies on which the social fabric depends, just as the physical fabric of the universe depends

on centripetal and centrifugal action and reaction. If the social or economical balance has been disturbed by the preponderance of either individualism or communalism, the family relations are in no danger from its re-adjustment. If the land question can be solved, the rural districts re-peopled, and the sturdy yeomanry, which at the end of the sixteenth century constituted, it is said; one-sixth part of the whole population of England, restored to our fields by reverting to communal holdings in circumstances that do not admit of separate individual property, or amongst races that take more kindly to Communalism, both the life of the family and the life of the State will be gainers by the change. What we must be careful to provide against is the risk which will always exist of Communalism degenerating into Communism, and impeding individual development and activity. There is no conceivable incentive to well-doing equal to the prospect of acquiring individual possessions and personal distinctions, and of transmitting those good gifts of God, as far as may be, exclusively to those who are nearest and dearest to us. Personal and family ambition are the mainsprings of progress, and any scheme of life which proposes to set them aside or to subsume them under what may at first sight appear to be the interest of the greater number, will lead not to stagnation only but to retrogression. The communities that have risen highest have invariably been those which contained the greatest number of eminent men, and of families which continued for generations to hold the eminent positions which their ancestors had won for them. It is the rivalry excited by the presence and the example of such individuals and such families that gives an upward tendency to national life, and no passions are nationally so suicidal as the jealousy which would prevent their rise and the envy which would pull them down.

And this leads us to consider a subject of permanent interest, and one which bears in a very special manner on the political and social questions of the hour, I mean the hereditary principle.

Even amongst those who profess to attach the greatest value to the family as a social institution, and who would be unfeignedly shocked at any proposal to encroach on the sanctity of the domestic relations, there are many who appear to think that the family ought to be limited to one generation. The ultimate social and political unit, they say, is not the family but the person; as advocates for personality they maintain that each man is entitled only to the fruits of his own activity, that the claims of his children to participate in them cease with the attainment of majority, and that his own right to devote his property to their exclusive benefit terminates with his life. He may do what he will with his own, so long as it is his own; and if he pleases to support or to assist

his adult children whilst he lives, good and well; but when he dies his proprietary rights die with him. In justice to the rest of the community his children must start on their respective careers on the same footing as the children of other people. Even if they are permitted to succeed to his property, of which they are already probably in partial possession, it is regarded as absurd that they should be credited with his personal qualities, or that any attempt should be made to preserve for them the social or political position to which he had attained. It is by carrying out the principle of individualism in this direction that the greatest inroads have already been made, and are likely still to be made, on the conception of the family.

That, in former times, the hereditary principle was adhered to in cases to which it was altogether inapplicable cannot now be doubted. When offices requiring rare and special gifts were attempted to be transmitted from father to son the whole community was injured, and the greatest sufferer of all was very often the son himself. After an insecure and unhappy tenure of a few years, he was laughed out of the place in which his father had been revered and honoured. If there is to be succession in such cases at all, it must be by open and unbiassed competition. But the fact that rare and exceptional gifts do not descend, or, at any rate, cannot be counted on as descending, is no proof that there are not other gifts, of which for its own sake the community may well take cognisance, that do descend, both by blood and by tradition. There is no more reason to doubt that there are good and bad breeds of men, than that there are good and bad breeds of dogs and horses. Nor do we require to go out of the national type in the one case, any more than we go out of the species in the other, in order to detect these differences. There are good and bad breeds of Englishmen and Scotchmen just as there are good and bad breeds of bull-dogs and terriers. Moreover, the transmissible qualities are precisely those which are most indispensable for the everyday service of the State, and which consequently give the best claim to general precedence. They are for the most part bodily and mental sanity, honesty, courage, perseverance, self-possession, presence of mind, tact, memory, acquisitive power, and general business capacity. The experience of this and every other country proves to us that these qualities frequently descend in the same families through many generations, whereas the endowments which make poets, philosophers, and artists seldom appear in anything like the same perfection a second time. In a greater or less degree they too depend upon temperament, and the temperament is hereditary. The tone of the family continues to be literary, philosophical, musical, or æsthetic; but the quality which we characterise as "originality" is too sparsely sown to entitle us to

act on the presumption that it will twice fall to the share of the same stock. We speak of it as "the Gift of Genius," and in so far as it admits of analysis it may perhaps be defined as the power of penetrating to first principles by intellectual processes of which the individual himself is only partially conscious, and which he cannot fully explain to others. It trenches on that region of mystery which hides creative action from mere human observation, and this region it partially reveals. In this respect it resembles the gift of prophecy, and like that gift it is inexplicable and intransmissible. This assertion, if I have made it intelligible, I believe will be conceded without proof; but my former allegation, viz. that ordinary gifts are hereditary in particular families in an exceptional degree, I know will be called in question, and though our time does not permit me to go into it at any length, I shall adduce two or three instances in support of what I have said.

We live in an anti-monarchical age, when everything seems to be drifting in the direction of republicanism. Let me ask you, then, to consider whether the royal families of Europe have not exhibited the qualities I have mentioned, and exhibit them now, to an extent which, if we consider the very small number of persons who have always composed them, is quite exceptional. If we take the present crowned heads, is there any reason to believe that from the millions of their subjects Presidents of their respective states could be chosen better qualified for their duties, either from a social or from a political point of view? Compare them with the Presidents of the United States; or compare the present Emperor of Brazil or even poor Maximilian, whom the French deserted and the Mexicans murdered, with the Presidents of the South American republics. Has there been a President in France since the establishment of the present republic, or during the short lives of any of its predecessors, with whom the Comte de Paris, or at any rate the Duc d'Aumale, might not be advantageously compared? I do not say, of course, that the rule in favour of these exalted personages is without many exceptions; but, if you will go over the list of them in the almanac for yourselves, I think you will be surprised to find what a high average they reach as regards the moral, and intellectual, and physical qualities I have enumerated. You will be struck, I think, with the same phenomenon if you look at the families of the nobility and of the ancient gentry, in this country more especially. It may be absurd to credit the eldest son in each generation with qualities which entitle him to exercise the rights and impose on him, whether he will or no, the duties of legislation. Still the average ability of the peers who actually take part in the business of the House of Lords has always been quite equal to

that of the members of the House of Commons; and from the peerage alone I believe a senate, consisting say of fifty members, could be chosen, equal, if not superior to any senate that could be elected from the rest of the community. The superiority in ability which the latter might possess would be more than counterbalanced by the greater dignity and influence that would belong to the former. As bearing on the question of the relative advantages of birth and election, we in Scotland ought not to overlook the fact, that, at this moment, we owe any little attention that is paid to our affairs by Government, and any little influence we possess in the counsels of the nation, to the activity and patriotism of some half-dozen young peers, more than to the whole representatives we send to the House of Commons.

It is impossible to distinguish between the influence of birth and the influence of training in the production of the hereditary qualities of which I have spoken; but I think it may be said with safety that they could not be produced in equal measure by any training which did not commence with birth. Statecraft, like any other craft, may indeed be learned, and the capacity for the higher duties of citizenship might be acquired far more generally than it is if the Faculties of Law in our Universities were developed after the Continental model. To effect this is, as you know, one of our present aspirations as academical reformers. But there are many steps between the cradle and the Faculty of Law, and many of these steps can be taken with security only in the family leading-strings. For this reason I believe that, however perfect our educational system may become, the existence of what may be called political families will always be a prodigious advantage to the public service. But the disappearance of these families, be it desirable or undesirable, it is said, is inevitable. They are everywhere being swept away by the advancing tide of democracy. By many who do not urge the abolition of the second chamber, the hereditary element in the House of Lords is pronounced to be a political anachronism, the removal of which is a mere question of time. It may be so; but if that be done, what, in my opinion, will follow will be this: in place of being a hereditary *class* of the community, as they have hitherto been, the nobility and the ancient gentry will become a hereditary *caste*,—just as the clergy will become a sacerdotal *caste* if you disestablish the Church. Separate from the rest of the community, scarcely accessible to the *nouveaux riches*, they will close their doors against the rest of their fellow-countrymen. You may deprive them of political power, but you cannot abolish them, for the simple reason that you cannot abolish the past. The present, moreover, is continually reproducing them. They are a natural

[illegible]

principle or by irrational outbursts of popular impatience. So far from being an alarmist, I am one of those who believe that we shall tide over our present difficulties, as we have tided over past difficulties of far greater magnitude, without revolutionary or even constitutional changes that will affect the good feeling which has always prevailed, and prevails now, between all classes. But there must be no excluded class either at the top or the bottom of the ladder; and, in our struggles to relieve an excluded proletariat we must be careful that we do not create an exclusive aristocracy and a fawning and sycophantish plutocracy. The *mot d'ordre* to all must be "upward." All must not only be permitted but invited to ascend. Far from abolishing hereditary titles of honour, they ought, in my opinion, to be distributed even more freely than they are at present. Englishmen laugh at the poor little *bouton* of the Legion of Honour; but I would sooner trust a Frenchman who had it, than a Frenchman who hadn't it, and I believe France could better trust him. The chances are that he will be an honest fellow than plain Monsieur Chose, who calls himself Monsieur *de* Chose, because he is ashamed of acknowledging in his own person the *égalité* for which he is shouting all the day long in the case of other people. Titles of honour conferred by the State are the cheapest price at which patriotism can be purchased.

There are many, I know, who expect all such paltry expedients for the maintenance of existing social distinctions to be swept away, and the social levelling which they favour to be effected by the abolition of the laws of primogeniture and entail, the breaking up of the great estates, which is expected to result partly from these measures, and partly from the depression in the value of landed property which the increased facilities for the importation of food will probably render permanent. I believe they are mistaken in both directions. Even if the subdivision of landed property were made compulsory, so long as freedom of sale was permitted, hereditary traditions would assert themselves by means of family arrangements; and cheaper modes of conveyance would very soon bring matters back to their present position. The ingenuity and cupidity of conveyancers may be trusted to circumvent any positive law as little in harmony with general feeling as a law for the compulsory subdivision of land would certainly be in this country. As for the breaking up of estates, I quite anticipate that the fall in the value of land will lead to the sale of their out-
 ings by many proprietors who find it difficult to conform
 its to their present incomes. But so far from diminishing
 nce of the great landed families, the sale of such portions
 states as they are likely to part with will, I believe, both

... their numbers. From the
... always be a luxury, and
... investment. It has never
... and certainly will not yield
... at its greatly reduced
... be got, with as good or
... by land, for mercantile
... in this position of affairs the
... a prodigious loss of income, to
... capital from the fall in the
... them will be unable or unwilling
... to sell their outlying farms, the
... extremely troublesome, and
... owners a mere imaginary
... to their personal enjoy-

... be restored to, or it may be
... amount, and they will be enabled
... the bountiful expenditure to
... this all. The purchasers
... and professional men,
... fortunes to this country,
... most valuable accession to the
... first sight they may appear to

... the plutocracy do really press
... threaten to push them from the
... in public estimation. The
... countryside. The proprietors, no
... investments, let their houses, and
... abroad, or take up a smaller
... those means are well invested,
... his trade or his profession, keeps
... from which the proprietor
... tent; hunts with the pack,
... he contributes liberally,
... neighbours of the laird, to
... and probably ends by
... may be prevented at the
... which, I believe, are
... necessities. The impoverished
... if he chooses, at once
... he can return to the
... the hospitalities of his
... through his grounds,

he can shoot in his covers, he can fish in his streams, and may again be the master of the hounds himself, if he will consent to limit the acreage of his estate to what he can really use and enjoy. By ceasing to be a nominal proprietor, he can become a real proprietor once more.

But, though he consents to sell, will the other consent to buy? Will he give up the advantages which he derives from his lucrative investments for the charm which is said to cling to the proprietorship of land? Not wholly, I think. The lesson taught him by the fate of his former landlord will not be wholly lost on him. He will not purchase a great estate and play at the game of becoming a feudal baron. But the love of the country and of country ways is so universal, and the advantages which country residence affords in health and length of days are so unquestionable, that, as wealth and the facilities for locomotion increase, men of all classes will more and more tend to devote a portion of their means to the acquisition of permanent country abodes. Occasionally the present tenant-farmers may purchase their holdings, but for any one who wishes to make a trade of farming the colonies will continue to offer greater inducements. More and more our home-acres will be devoted to what, in a wide sense, may be called pleasure; pasture-lands and plantations will take the place of corn-fields in the poorer soils, and new residences will be formed by men whose means of living comes from other sources, and who will cultivate their own lands for their amusement at what they themselves will be willing to recognise as a pecuniary sacrifice. It is this consciousness of the unprofitable character of all landed tenure which, when the great estates are sold off, will, I believe, prevent them from again accumulating. The richer a man is, the greater will be the sacrifice he is willing to make; but, if I am not mistaken, the passion for adding field to field has received a final blow, and few men in future will consent to the loss and trouble attendant on mere nominal proprietorship. But the notion that a permanent and hereditary landed class will be thereby stamped out is one of the grossest delusions that ever entered the brain of a radical stump orator. We shall have more proprietors, of all sorts and sizes, who will transmit their possessions to their descendants as their fathers did, or would have done, to them; and whether we have peasant-proprietors or not, we shall have more peasants—because it is astonishing to what an extent the multiplication of resident, or even partially resident, proprietors tends to augment the population of a country district. I once made a pretty careful calculation of the effect in this respect of breaking up a single estate of £50,000 a year into two estates of £25,000, then into five estates of £10,000, then into

ten estates of £5000, and so on. The rapidity with which population increased with subdivision was surprising. It is always of the subdivision of farms that we talk when the melancholy spectacle of roofless cottages meets our eye, whether in our Highland glens or our Lowland fields; but I believe the subdivision of properties will do far more for the restoration of the rural population than the subdivision of farms, and that it is only in conjunction with it that there is the least prospect of farms being subdivided.

Whether or not we succeed, by means of any of the schemes which at present occupy so much of the public attention, in substituting a proprietary for the old feudal yeomanry, the claim for fixity of tenure, which forms so prominent a feature in them all, must be regarded as a pleasing indication that the idea of the permanence of family life is deeply rooted in all classes of our people. I am aware that it is chiefly on economical grounds that fixity of tenure is contended for by the shallower part of our land-law reformers, and that by them it is often sought by means which I regard as positively dishonest. To seek to convert a lease into a charter by some side-wind of legislation, under the pretence that it has become a political necessity, I regard as nothing less than an attempt to legalise confiscation. It would be the first step in the direction of the great scramble in which civilisation itself must perish. No political necessity can ever carry us beyond the ten commandments. I believe it to be impossible to convert paupers into proprietors at once, by any means whatever, because the improvidence which made them paupers would immediately make them cease to be proprietors; and surely it is neither in teaching them to be thieves, nor in the State itself becoming a thief on their behalf, that the transition-stage is to be found. But, on the other hand, if fixity of tenure can be honestly attained—whether that tenure be proprietary or leasehold—there is no other method, either economical or educational, by which, in my opinion, an upward tendency may be so readily communicated. An historical people and a civilised people have always been convertible terms, and it is only by rooting the historical sentiment in the family that its social and political influence can be secured.

But though the permanent tenure of land is certainly favourable to the development of historical sentiment it is not indispensable to it. The Jews, who for the most part have no land anywhere, have always exhibited it in an exceptional degree. There are many tradesmen in this city who have long pedigrees. One family of jewellers, I understand, have exercised their craft without interruption since Queen Mary's days; and I knew a

small farmer—a crofter I suppose I ought to call him—whose family had been tenants-at-will of the Dukes of Hamilton in Arran for three hundred years, and who, at that time, had no desire for any further security. It has often seemed to me that this invaluable sentiment might be more widely diffused if some simple and inexpensive arrangement for the registration of pedigrees were made at the Lyon Office in Scotland and at the Heralds' Colleges in London and in Dublin. In their present condition these institutions are mere playthings of the rich, but I see no reason why they should not be turned to wider and nobler uses. Such registration could not, of course, be made compulsory, but, in order to induce applicants to come forward, it might with great advantage be conducted at the public expense. The subject is one which I commend specially to the gentry, because in the times in which we live, far from intensifying class distinctions, I believe that their maxim with reference to the rest of the community, for their own sakes, ought to be, "Would to God they were all gentry!"

on centripetal and centrifugal action and reaction. If the social or economical balance has been disturbed by the preponderance of either individualism or communalism, the family relations are in no danger from its re-adjustment. If the land question can be solved, the rural districts re-peopled, and the sturdy yeomanry, which at the end of the sixteenth century constituted, it is said; one-sixth part of the whole population of England, restored to our fields by reverting to communal holdings in circumstances that do not admit of separate individual property, or amongst races that take more kindly to Communalism, both the life of the family and the life of the State will be gainers by the change. What we must be careful to provide against is the risk which will always exist of Communalism degenerating into Communism, and impeding individual development and activity. There is no conceivable incentive to well-doing equal to the prospect of acquiring individual possessions and personal distinctions, and of transmitting those good gifts of God, as far as may be, exclusively to those who are nearest and dearest to us. Personal and family ambition are the mainsprings of progress, and any scheme of life which proposes to set them aside or to subsume them under what may at first sight appear to be the interest of the greater number, will lead not to stagnation only but to retrogression. The communities that have risen highest have invariably been those which contained the greatest number of eminent men, and of families which continued for generations to hold the eminent positions which their ancestors had won for them. It is the rivalry excited by the presence and the example of such individuals and such families that gives an upward tendency to national life, and no passions are nationally so suicidal as the jealousy which would prevent their rise and the envy which would pull them down.

And this leads us to consider a subject of permanent interest, and one which bears in a very special manner on the political and social questions of the hour, I mean the hereditary principle.

Even amongst those who profess to attach the greatest value to the family as a social institution, and who would be unfeignedly shocked at any proposal to encroach on the sanctity of the domestic relations, there are many who appear to think that the family ought to be limited to one generation. The ultimate social and political unit, they say, is not the family but the person; as advocates for personality they maintain that each man is entitled only to the fruits of his own activity, that the claims of his children to participate in them cease with the attainment of majority, and that his own right to devote his property to their exclusive benefit terminates with his life. He may do what he will with his own, so long as it is his own; and if he pleases to support or to assist

his adult children whilst he lives, good and well; but when he dies his proprietary rights die with him. In justice to the rest of the community his children must start on their respective careers on the same footing as the children of other people. Even if they are permitted to succeed to his property, of which they are already probably in partial possession, it is regarded as absurd that they should be credited with his personal qualities, or that any attempt should be made to preserve for them the social or political position to which he had attained. It is by carrying out the principle of individualism in this direction that the greatest inroads have already been made, and are likely still to be made, on the conception of the family.

That, in former times, the hereditary principle was adhered to in cases to which it was altogether inapplicable cannot now be doubted. When offices requiring rare and special gifts were attempted to be transmitted from father to son the whole community was injured, and the greatest sufferer of all was very often the son himself. After an insecure and unhappy tenure of a few years, he was laughed out of the place in which his father had been revered and honoured. If there is to be succession in such cases at all, it must be by open and unbiassed competition. But the fact that rare and exceptional gifts do not descend, or, at any rate, cannot be counted on as descending, is no proof that there are not other gifts, of which for its own sake the community may well take cognisance, that do descend, both by blood and by tradition. There is no more reason to doubt that there are good and bad breeds of men, than that there are good and bad breeds of dogs and horses. Nor do we require to go out of the national type in the one case, any more than we go out of the species in the other, in order to detect these differences. There are good and bad breeds of Englishmen and Scotchmen just as there are good and bad breeds of bull-dogs and terriers. Moreover, the transmissible qualities are precisely those which are most indispensable for the everyday service of the State, and which consequently give the best claim to general precedence. They are for the most part bodily and mental sanity, honesty, courage, perseverance, self-possession, presence of mind, tact, memory, acquisitive power, and general business capacity. The experience of this and every other country proves to us that these qualities frequently descend in the same families through many generations, whereas the endowments which make poets, philosophers, and artists seldom appear in anything like the same perfection a second time. In a greater or less degree they too depend upon temperament, and the temperament is hereditary. The tone of the family continues to be literary, philosophical, musical, or æsthetic; but the quality which we characterise as "originality" is too sparsely sown to entitle us to

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widespread knowledge of physics. In these circumstances it was surely unfortunate that so great a scientific authority should have confined the epithet science to the class of laws whose claim to it, adopting necessity as the test, rests on a narrower basis than any of the others. Nor was this misfortune lessened by the fact that Sir Lyon Playfair was addressing a body of physicists who naturally must have been but too apt to fall into this error themselves.

In making these remarks I trust it will not be supposed that I am indulging in a mere piece of verbal criticism. The matter assumes great practical importance when we consider the effect which such views may have on the development of the higher instruction in our secondary schools and universities, and more particularly in the University of which we are members. With Sir Lyon Playfair, I fear that at no distant date classics must to a very considerable extent give place to science. The time at present devoted to Latin and Greek can no longer be spared to them; and, unless we revert to the practice of teaching them as spoken languages, they must inevitably go to the wall. Philology will continue to flourish, and philologists will cultivate classical scholarship as a speciality; but, as a branch of general instruction, the pedantry and inefficiency of the present system of tuition has sealed its doom. But it will be a dreary outlook for the intellectual life of the future if philosophy is to go along with scholarship, and our universities are to become, for the generality of students, mere schools of physical science and medicine, of dogmatic theology and empirical jurisprudence.

With this danger before us, which the character of the age and the recent history of this University render anything but visionary, it may not be inappropriate that I should occupy what remains of our first *hora academica* in calling your attention to the existence and explaining to you, if I can, the reciprocal action of two natural laws which are not physical, but on the recognition and vindication of which physical as well as moral and social well-being is largely dependent.

There is no proof of the unity of the scheme which pervades the universe so remarkable as the common dependence of physical and moral life and development on the action of antagonistic forces. What we speak of as centrifugal and centripetal action in the physical world corresponds with surprising exactitude to what, in the moral world—in society and the State—we call centralisation and decentralisation. In both cases conflict is the condition of life. Growth and progress are proportioned to its activity; decay and retrogression are the consequences of its cessation. In this general sense, the sense unquestionably in which he meant it, no

saying was ever truer than that of old Heraclitus that "War is the father of all things." But between the physical and moral worlds, in this fundamental law as in all consequent and subsidiary laws, there is this prodigious difference, that whilst in the physical world the law is self-acting, in the moral world its action, to no inconsiderable extent, is dependent on human volition. Ultimately, no doubt, here, as everywhere, relative must give way to absolute will. The moral world, like the physical world, continues to be governed by the power by which it was created; and we can no more avoid crowding into centres and spreading ourselves over the face of the earth than we can prevent water from running down or grass from growing up. It is the extent and rapidity with which we are to centralise or decentralise in a given place and for a given time that alone is optional to us; and what may almost be regarded as the central problem of politics, both national and international, consists in discovering the natural law which governs the relation between these two inevitable tendencies. In what relation must they stand to each other in order that their mutual action may be favourable to their common object, which, as optimists, we must assume to be the realisation of the ideal of humanity as divinely revealed to it, whether directly or indirectly.

As at once antagonistic and progressive, one or other of these forces will obviously be always in excess. That such has been the case in the past is a phenomenon which history reveals with unvarying consistency. Their tendency has always been to push each other not only upwards but aside, and thus the line of progress has never been a straight line. There has always been exaggeration either in the direction of centralisation or decentralisation; and as the turning-point is largely within the reach of human control, the question which for the guidance of legislation we have first to determine is,—Which of these two impulses preponderates, which of them is in excess for the time being, and in the locality with which we are concerned? The main difficulty which stands in the way of the observer in determining this point is that he himself is, for the most part, under the influence of one or other of the tendencies which he seeks to measure. He is a child of his time, and if he has escaped the influence of the dominant tendency, he is pretty sure to have been caught by the reaction which it always provokes, and the value of which he probably exaggerates, and it thus requires no inconsiderable effort to reach a neutral position. We have said that both centralisation and decentralisation are progressive tendencies. But progress, like utility, is a vague word, and till we have made up our minds where we are to go, not only ultimately but proximately,

it is of little avail to know the direction in which the wind is blowing. What then are the ends, the objects, the *τέλη*, as Aristotle would have called them, with which men crowd or are crowded together, and with which they spread themselves abroad? To this question we may return either a general or a special answer, according as we regard it from an ethical or a jural point of view. Ethically considered, the object of the progressive tendencies of our nature, as I have already indicated, is the development and, in so far as lies within it, the complete realisation of that nature itself. It is that humanity may become more and more human. Jurally considered, on the other hand, the object of progress is liberty, freedom of action, capacity to avail ourselves, not only without let or hindrance, but with mutual aid, of all the powers of self-evolution with which our nature is gifted. Each of us must not only permit the other, but must help him, to become himself. The object of jurisprudence, being thus the means by which the higher object of ethics is attained, becomes our proximate goal; and the contribution which either centralisation or decentralisation makes towards its attainment must be the measure of its value for the time being and in the locality with which we have to deal. The question which we must ask ourselves is, Does the subsisting relation between these two forces promote or impede the freedom of action of the individual members of the community, and, if not, which of the two forces has gained the ascendancy and is causing the impediment?

Now it will not be disputed, I imagine, that in the earlier stages of the history of every people progress towards the realisation of freedom was impeded by the weakness of the centralising element. If the savage was free from the power of others, he was the slave of his own weakness, and this subjective serfdom received its first mitigation from the savages by whom he was more immediately surrounded. Within the family itself, in return for the care and protection of the patriarch, his sons became his soldiers, his sailors, his huntsmen, and his tillers of the soil; whilst his wives and his daughters cheered his solitude, managed his domestic affairs, adorned and decorated his abode, and nursed him in his sickness and old age. To this extent the formation of the social nucleus, which gradually expanded itself, was inevitable; and the centralising tendency which kept it together was, in general, strong enough to resist the decentralising tendency resulting from the formation of separate families. Thus the family grew into the village, and as wants increased and individuals and localities developed special capacities for supplying them, the village grew into the town and the town into the city. But this process, always slow, is one which even at the present day many races

seem incapable of carrying beyond its elementary stages. It is in consequence of this defect that, notwithstanding all the benevolent efforts which are made for their preservation, the aboriginal inhabitants of America threaten to disappear. With them the arts of life never rise beyond individual ingenuity, and they are incapable of receiving them at the stage they have reached in civilised communities. As they have no history, one generation derives little benefit from another, and there are no depositories of traditionary wisdom around which men might be tempted to crowd. The chief object of the missionary station is to supply such a point of crystallisation. Amongst the higher races of mankind, on the other hand, the action of the centralising tendency is strong and continuous, and, till civilisation has reached a very high point, is continuously beneficent. During the middle ages, it was in the towns alone that that higher freedom which results from mutual aid and mutual supervision was obtainable. Whilst in the open country war was the chief occupation, and the law of the stronger the only rule of life, within the city walls the weak and the strong alike enjoyed freedom under communal arrangements which enabled them to cultivate the arts of peace. The division of labour gave free play to the endlessly varied intellectual and moral resources of the community. Wealth grew apace, with wealth leisure, and with leisure refinement. The powers of enjoying life increased with the means of enjoyment, and these appeared to be within the reach of all. I need not dwell upon the familiar and too attractive picture of city life—a picture which to the eyes of many a simple countryman seems all lights and no shadows, and the temptations of which continue to be one of the many causes which, in our own day, have turned the centralising tendency from a blessing into a curse.

The points of time at which this change occurred in the various European countries varied extremely, but the point of progress was the same in all. It was the point at which centralisation becomes suicidal, when it counteracts its own action and defeats its own end. The most unmistakable indication that centralisation has exhausted itself and ceased to contribute to freedom of action is seen in the phenomenon of overcrowding. In the earlier stages of civilisation, from the security which the village or the town affords from savage beasts and still more savage men, from the better food and shelter which it supplies, and from the care of the aged and infirm which it renders possible, life is longer within its walls than in the open country. Gradually, however, this is reversed. The area not only of the soil but of the air becomes too limited for the support of healthy animal life. The water gets scanty and impure, filth accumulates, and men

begin to shorten each other's lives by the mere fact of their proximity. At first the fact is ignored, then it is denied, till the ravages of disease and the ruthless tables of the Registrar-General force on the unwilling admirers of centralisation the admission that the *squalor urbis* is depriving them here of a fourth, there of a third, and in some cases close upon a half, of the span of life constitutionally allotted to their race. Radicals, for the most part, favour urban as contrasted with rural life. Still Mr. Chamberlain, in his recent speech at Glasgow, quoting Professor Rogers, said: "There is collected a population in our large towns which equals in amount the whole of those who lived in England and Wales six centuries ago, but whose condition is more destitute, whose homes are more squalid, whose means are more uncertain, whose prospects are more hopeless, than those of the poorest serfs of the middle ages." Nor are the moral and intellectual effects of the unimpeded and artificially stimulated action of centralisation less disastrous. In our great cities vice of every kind attains monstrous dimensions, and assumes hideous and unnatural forms undreamt of amongst the simpler inhabitants of sparsely peopled districts. This becomes a new source not only of bodily but of mental disease. Even in the case of decent and orderly persons, the hurry and excitement of city life shatters and exhausts the nervous system, and heart-complaint and paralysis deliver their fatal summons before it is due.

In the direction of intellectual activity and social aptitude, the advantages in the earlier stages of development were all on the side of city life. It is contact that sharpens men's wits, that polishes their manners, and is the source of all the gifts and graces embraced under the term urbanity as contrasted with rusticity. But in this direction too a point is reached beyond which the intellectual and social, like the physical, atmosphere is too limited, and contact becomes obstruction. Even amongst the educated a certain dead level of taste and culture, a uniformity of opinions, an identity of aims and objects of ambition, is produced which stifles originality and effaces character. To this remark an exception must, of course, be made in favour of the governing class in constitutional countries, of the leading members of the professions, and of those who have gained a conspicuous position in science or literature or art. But in addition to the fact that they are a mere handful in the midst of the surrounding multitude, there are two considerations which must be borne in mind with reference to this latter class of persons. The first is that their occupations necessarily give to them a cosmopolitan character which renders the place of their residence a matter of comparative indifference. The second is that they have in general, or that

they form for themselves, local spheres of interest and sympathy, from which they draw physical and mental refreshment, however dense may be the immediate atmosphere that surrounds them. It is seldom that they can be counted as permanent members of an urban community. Very often they were recruits from the country, and in almost all cases it is to the country that they turn their eyes as their ultimate place of abode should fortune favour them. As regards ordinary persons who, whether from choice or necessity, remain, it is surprising to how great an extent not only the advantages of contact with their fellow-men, but even such contact itself, are often lost in the crowd. One of the most solitary human beings I ever knew was a benevolent old gentleman, in affluent circumstances, who lived in London. In his latter years he had scarcely any acquaintances, and if it had not been for his Scotch relatives, who frequently availed themselves of his hospitality, he might almost have lost the power of speech.

Though the largest city that the world ever saw has grown up in our midst, London is not England as Paris is France, and this country has suffered less than France from over-centralisation. Neither our system of government nor our system of education has been centralised to the extent of sucking all political and intellectual life out of the provinces, or of preventing its growth in the colonies. Our centralisation has been material and economical rather than social, political, or intellectual. Though the tendency in the direction of material centralisation now unhappily manifests itself in excess in almost every European country, there is no other country in which the rush of the rural population into the towns has gone on with the same rapidity, and in which the rural districts have been depopulated to the same extent as with us. But there has been greater variety and consequent life in the rural population that has been left behind. The great estates and large farms are mainly chargeable with the depopulation of the country, but they have not produced the same social or intellectual stagnation, and the same inaptitude for self-government, which necessarily result from a uniform system of peasant-proprietorship; and if, by restoring our yeomanry without destroying our gentry, our small lairds, and our great farmers, we can lay a solid foundation under the existing superstructure of country life, all may go well. We may then be able to develop the organs of local self-government, which, since the abolition of the feudal system, have been more defective in later than in earlier times, so as to bring them into harmony with the burghal constitutions, which, on the whole, have exercised so beneficent an influence.

The hopeful sign for us is that the fact of the point having been reached at which decentralisation becomes the watchword of progress appears now to be acknowledged by all parties, and that Whigs, Radicals, and Conservatives—Englishmen, Scotsmen, and Irishmen—are vying with each other in devising schemes of Home Rule and Local Self-Government. For Imperial purposes there must continue, of course, to be an Imperial Exchequer, just as there must continue to be an Imperial Government. But if pecuniary advances for local purposes in all the three kingdoms are to continue to be made out of it—which I should think very undesirable—it is much to be hoped that Sir Lyon Playfair's warning words, as regards the learned and scientific institutions of Scotland, will meet with the attention they deserve. The new Scottish Department will, no doubt, be able to bring this matter before the Imperial Parliament with far greater effect than our Scottish representatives have done in recent years; and as the spirit of compromise is more of an English than a Scottish virtue, it is not likely that even the Imperial Treasury will be longer permitted to turn a deaf ear to our national claims. But if the process of decentralisation is to be successfully carried out, the co-operation of all classes will be requisite. The yeoman class has to be called, or recalled, into existence; and there is at present no rural class which exactly corresponds to the mercantile or trading classes in towns. In these circumstances it would be very unfortunate if the large proprietors who, personally or by their representatives, have hitherto managed county affairs were to withdraw from them as the professional class have withdrawn from burghal affairs. Under the leasehold system the farmers are scarcely a more permanent class than under the system of tenancy at will, and farm-servants are continually shifting about. Except when some measure which appears to them to touch their immediate interests is brought prominently before them, neither the farmers nor their servants care for politics at all. After the first novelty of the polling-booth is over, their visits to it will probably be few and far between.

Until a more extensive proprietary class springs up it is much to be feared that the public business of the rural districts, in so far as it is not managed by those who manage it at present, will fall into the hands of the inhabitants of the villages, and of such small towns as the Redistribution Act has thrown into the counties, and the objects of our recent legislation will be defeated. If local self-government is to become a reality, and the constitution is to have the support of the thoughtful and deliberate character of the rural voters against the headlong spirit of innovation which the sufferings of the poorer classes in towns inevitably engender, the

tide of population must be turned towards the country. I have never forgotten the impression it made on me when, in his celebrated tournament with Professor Blackie in the Music Hall, poor Ernest Jones, the Chartist, in the midst of a flood of revolutionary nonsense, suddenly shouted, "Back to the land! back to the land!" His stentorian utterance has been re-echoed by his learned antagonist ever since, with a perseverance which has had my warmest sympathies, though I have not always been able to concur in the arguments or to accept the allegations with which he has supported it. There is no occasion for recrimination with reference to the past, and very little occasion for legislation with reference to the future. There is, at this moment, as much excellent agricultural land for sale—and consequently open to subdivision—in this country as would afford space for the small squirearchy which one must hope will arise out of the skilled agriculturists, and for a peasant-proprietary class besides, as numerous as the most ardent land-reformer could wish. But the only peasant-proprietary class that could make any reasonable use of the land, if they had it, is the class that is able to purchase it. It is to them, and not to the helpless denizens of the slums, that we must cry, "Back to the land!" If the congestion of our great centres of population is ever to be relieved, it is the well-to-do class of tradesmen and shopkeepers in the towns that must lead the way to the green fields from which so many of them drew the health and vigour to which they have owed their success. But this, unfortunately, is a class, and almost the only class, which hitherto has exhibited no interest in the movement. Many of them have lost their country tastes, or these have become too feeble to influence their conduct. Others are chained to the city by the hope of still increasing their own gains, or of finding remunerative occupation for their children. The great deterrent, however, has been the ill success which has almost invariably attended the experiment of returning to the country, in the only form in which that experiment has been tried, viz. of farming on a considerable scale. Even to skilled agriculturists, for many years past, this has not been a remunerative occupation, and to outsiders of all kinds it has been uniformly disastrous. But no two problems can be more different than that which is presented to the tenant of a large farm and that which is presented to the purchaser of a few acres; and there is no reason why the failure of the one should damp the hopes of the other.

When we turn from national to international relations, the attitude of the two tendencies of centralisation and decentralisation undergoes a transformation. In the earlier phases of European civilisation we no doubt see two great centralising factors at work

—the Roman Empire and the Roman Catholic Church. Had they worked in unison, the common object which vaguely presented itself to each of them, of bringing the whole of civilised mankind into the condition of a homogeneous organism governed by the same ethical and jural conceptions, might have been attained. But they worked in antagonism. There was Disruption; there was Disestablishment; and in place of recognising their interdependence, each became to the other an *imperium in imperio* which strove to subjugate it and swallow it up. The Church, in pursuit of her own ends, substituted dogma and ritualism, which the clergy were able to keep in their own hands, for the ethical revelation which was God's gift to clergy and laity alike. And the laity did violence to their own consciences in order to bring in the arbitrament of physical force. It thus came about that, in place of promoting either ecclesiastical or political freedom, these two centralising forces impeded both, and, as invariably and mercifully happens when forces cease to fulfil their functions, they became self-destructive, and ceased to be forces. Both the Empire and the Church burst into fragments, and the tide turned in the direction of decentralisation; in the one case on the fall of the Western Empire, and in the other at the Reformation. Separate nations sprang up, each struggling for a position of absolute independence and political isolation. National Churches were formed, which, becoming part of the national organism, ministered in the most important way to the purification of manners and the development of orderly freedom. Had this process become general, and had the civil and ecclesiastical elements held together even then, we might by this time have had a foundation of international morality adequate to support a system of positive international law. Gradually, however, there was exhibited, on a smaller scale, in the separate States, the phenomenon which we have just noted in the European community as a whole. In the countries which adhered to the Romish Communion, the antagonism between the civil and ecclesiastical powers continued to act, and has continued to impede both social and political progress. In the Protestant States the same tendency has exhibited itself, though not to the same extent. The ecclesiastical has drifted away from the civil element, and has ceased to act freely on the social and political life of the community. Religion has become a thing apart, and the godliness of Sunday has been a cloak for the godlessness of Monday. This unfortunate tendency has been stimulated by the formation of sects which have separated themselves from the National Church either on dogmatic or ritualistic grounds. Dogma and ritual have always been the strongholds of fanaticism and priestcraft, and the

temptation to magnify their importance is one which no disestablished Church, and few established Churches, have been able to resist. But it is a temptation which does not assail the laity as it assails the clergy. The importance of National Churches for national purposes was so well understood by our ancestors that it is not likely to be forgotten by those who value civil liberty and social freedom; and when the question of Disestablishment is once fairly taken up by the laity, we shall probably hear little more of it.

But there are comparatively few people who interest themselves about international politics, and the influence of the union between Church and State on international development has been less generally observed. A very little reflection, however, on familiar facts will enable us to perceive that whilst the dogmatic and ritualistic peculiarities of a Church which is independent of the State—the Roman Catholic Church, for example—exerts very little influence on the reciprocating power of a State as an international unit, the ethical element, of which the State Church is more especially the guardian, is the very element on which reciprocating power depends. Separate political communities may develop their internal freedom from motives of immediate self-interest which are obvious to their individual citizens, and even ethnical groups may hold together from the ties of blood and speech; but nothing short of the development of reason and conscience will generate those sentiments of international responsibility which are the source of international law, and consequently of freedom of international action. When we cross the frontiers of the State, and transcend the ethnical group, we must rise to ethical conceptions, and go back to the principles of jurisprudence as a science of nature, if we would build up a system of positive international law. By a careful study of consuetude we may get some insight into the genuine and durable sentiments of mankind; but a collection of treaties, negotiated from motives of immediate convenience to the contracting parties, is a rope of sand that will hold together—a house of cards that will stand—no longer than the convenience endures. Of this the famous “Peace with Honour” would be a ludicrous if it were not a pitiful instance. It is said that the Bulgarian insurrection has taken Europe by surprise. Europe must know very little of the forces which govern human affairs if she expected anything else from an attempt to substitute an arbitrary for an ethnical frontier.

There is every reason to believe that the spirit of centralisation, which under the form of nationality has become so powerfully operative in separate States, will now extend itself to the

ethnical groups of which they form the units. In a loose and general way Teutons will hold by Teutons and Slaves by Slaves, and it is conceivable that even Celto-Romanic sympathies may yield practical results; but in the relations between political communities, in so far as they belong to separate ethnical groups, the decentralising principle still reigns supreme. There is no theoretical and very little practical recognition, either of the reciprocity of rights and duties or of the solidarity of the interests of separate States. The family of nations is a family of which the members recognise no family ties. In proof of this assertion, I may perhaps be permitted to remark that, so far as I know, I am as yet the only writer on the law of nations who has ventured to substitute interdependence for independence as the basis of his system. Sir Travers Twiss is one of the latest and ablest contributors to the subject. No jurist is more deeply impregnated with the international spirit, and few individuals have done more for its concrete realisation—witness, for example, the zeal he exhibited on the recent occasion of the Congo Conference at Berlin. Still the title which Sir Travers Twiss adopted for his book, and has retained in the last edition, is “The Law of Nations considered as *Independent Political Communities*”; and though often explained away by the context, the phraseology, which originated with the negative school of jurisprudence, remains unmodified throughout the work. Very much the same may be said of Baron Holtzendorff’s recent *Handbuch des Völkerrechts*. It bears traces in every page of the high philosophical as well as juristic culture which it was the happy privilege of his countrymen of the generation to which he belongs to receive, and the inseparable relation between law and ethics is seldom lost sight of. Still, in the very first page, he speaks of *Unabhängige Staaten* as the proper subjects of international law. Now to me it appears that in a world “*wo alles sich zum Ganzen webt*,” *Unabhängigkeit* is an inadmissible conception. Wherever it was necessary to distinguish between the spheres of action of different political communities, I have, consequently, used the word *separate*, and have been careful to explain that, so far from implying independence, the separation of political communities, like that of all other created entities, has for its object their mutual aid and support, with a view to the freedom of their separate activity. Whether this modification in the terminology of our science will ultimately find acceptance with international jurists, I cannot tell. For the present it is *sub judice*; and I feel sure that my Continental colleagues, at all events, will do me the justice to give it their careful consideration. As regards yourselves, I must reserve its justification for another place; but if you will do me the favour to think it over de-

liberately, I believe you will see that it cuts deep into principle, and that, if logically applied and loyally accepted, its practical effect must be to modify very essentially the point of view from which all international questions are at present regarded. The free ethical air which was the "source of the old prophetic fire," and which breathes over Christendom from the Sermon on the Mount, will be let in on them, and from the stifling and murky hiding-places to which national selfishness and diplomatic cunning have consigned them, they will step boldly forth into the honest light of science and common-sense.

XVI.

POLITICS AS A PROFESSION.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
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THE contrast between the care and caution with which we administer our laws, and the carelessness and rashness with which we enact them, must often, I am sure, have presented itself to your minds as a strange anomaly. You yourselves know—some of you, it may be, but too well—the barriers which have been erected around the profession of the law. Without the wedding-garment of elaborate culture, first general and then special, no man may enter its sacred precincts. A rich and varied literature has preserved the wisdom of its sages. Its traditions and its customs have been transmitted from generation to generation, from age to age, from land to land. It has been defined by judges, systematised by text-writers, codified by jurists, and expounded by professors. Of all this wealth you are the inheritors; and it is only on condition of your having duly served yourselves heirs to it that you are permitted to perform the most ordinary functions of the counsel or the judge. All cases and all clients, moreover, are equal before the law; and be the relation never so trivial, the law of the land which governs it, or is intended to govern it, will be ascertained and administered *secundum artem*.

But what of the law of the land which we thus administer? By what art was it discovered and elaborated and defined? Who adjusted it to principle on the one hand, or to practice on the other? What guarantee have we that it is in accordance with the Ten Commandments, or that it takes into account the conditions in which the Ten Commandments must be administered in our day and generation? To all these questions the reply will be, that the law of the land is the voice of the people, speaking through their constitutional representatives, and that the voice of the people is the voice of God. But though divine wisdom be always the ultimate factor, it by no means follows that it is the

proximate factor in human affairs. There are such things as human perversity, selfishness, and folly. God has marked them with His disapproval, it is true, and has given us moral and intellectual vision sufficient to enable us to read His marks. But, for this very reason, He has left us to read them for ourselves, and it is in order that we may read them aright that, within the sphere of jurisdiction, we have provided ourselves with such elaborate means of interpretation. But when we pass from the sphere of jurisdiction to the sphere of legislation, I again ask, What means do we possess? Where are our trained and skilled legislators who shall correspond to our professional administrators of the law? As an optimist, I am willing to concede to the popular will all the sanctity that the most advanced Liberal can claim for it. In the last instance, I believe it to be divinely guided, for the simple reason that the will of the creature must ultimately conform to the will of the Creator. But how is the last instance to be arrived at? Assuming the ultimate will of a free people to be right: right in all cases, not accidentally, but necessarily: right in accordance with the very nature of things: how is this ultimate will to be reached? It is not with general impulses but with special decisions that, for practical purposes, we have to deal. The problems which must be submitted to the general will are neither few nor simple. Their solution makes calls not only on the highest intelligence, but on the most extensive and varied knowledge. Even with these aids, it is often only partially attainable. Can the general will, in such circumstances, be expected to act spontaneously? With the utmost purity of motive, is the general intelligence equal to the task, or is the task not one which the general intelligence, unless aided and enlightened, will abandon in despair?

Of all political delusions the greatest is that of supposing that any great community will ever legislate for itself by means of any electoral machinery which it can devise, or which can be devised for it. The electoral machine itself must be worked, and, for this purpose, individual interposition is inevitable.

One used sometimes to imagine that, at this point, individual interference might be arrested,—that, if some modification of Mr. Hare's system were adopted, if a simple list of the names of all those who were desirous of being elected were officially published, and the electors were then left to themselves, all canvassing and speech-making being forbidden, the genuine verdict of the community might be ascertained. But the objections to this arrangement, it is to be feared, would exceed its advantages. The constituents, for the most part, would know nothing of the candidates. A speech, though not remarkable either for its sincerity or its

candour, always reveals something of the opinions or prejudices of the speaker. However much he may garble his information or doctor his statistics for party purposes, he must bring the leading questions of the day to the notice of his auditors, and put them in a position to compare his views with those of his opponent. All speeches, moreover, are by no means of this questionable character. Many of them, both in and out of Parliament, are unprejudiced, earnest, and enlightened in the highest degree; and these speeches, when reproduced and commented on in the newspapers, form the best, and indeed the only, political instruction which the community receives.

But men, or at any rate the best men, do not make speeches unbidden. Requisitions must be presented to them, and for this purpose committees and associations, embracing narrower and wider areas, must be formed. These primary organisations for the selection and support of candidates, in democratic countries more especially, are the fountainheads not only of legislation and jurisdiction, but of administration. No modest or self-respecting man presents himself as a candidate for a seat in a Town Council, a School Board, a Parochial Board, or any other public body. He waits till his services are called for by his fellow-citizens, and, as the duties of such offices imply no insignificant sacrifice of time and energy, and even of money, very considerable pressure is often required to induce the right man to come forward. A canvass, so exhaustive as to amount almost to a preliminary election, must be made, in order to satisfy him as to his chances of success. Here, then, is a field for the display of political aptitude that lies at every man's door, and one in which, if I mistake not, the public interest calls for professional interposition, both by tongue and pen, quite as much as in any other. Organisations for the purposes I have mentioned spring up so rapidly on the prospect of any kind of election, that promptitude is the first requisite in dealing with them. Unfortunately, however, they are spheres of action which present so few attractions for cultivated persons that, before they have made up their minds to interpose, matters have often reached a stage which would render their interposition ungracious and probably futile. It is from this circumstance, more than any other, that those whose services might be of inestimable value to their fellow-citizens are so often seen standing aloof. The first thing they hear of the affair is that a committee has been formed, that a chairman, an honorary secretary, and an honorary treasurer have been appointed, and that some worthy citizen, of whom they never heard, has proposed that another worthy citizen, of whose merits they are equally ignorant, shall be requested to allow himself to be nominated. Of the private meeting at which these matters were

really arranged no report is published, and this the first public meeting, of which the advertisement had escaped their notice, has already been held. Now I am not condemning these arrangements. In democratic countries I regard them as inevitable, and I only wish to inquire whether they would not effect the honest objects which, for the most part, they have in view, if the public had the services of a class of educated politicians who would make it their business to watch for them and to take part in them. At present they are too often in the hands of social busybodies and party wirepullers, who find remuneration for their trouble in the ephemeral notoriety which they acquire, or in the small appointments to which their activity leads. To those who contemplated a serious political career as journalists, as members of the Legislature, and ministers of State, these labours would offer nobler rewards in the insight they would give them into the springs of political life, and in the practice they would afford them in influencing the sentiments and moulding the opinions of their less instructed fellow-citizens.

This, then, is the first direction in which, as it seems to me, the professional politician would find a function useful to the community and profitable to himself. It is as a trained and skilled elector that he must first seek the confidence of his fellow-electors. His second function is that of a representative, and as such of a legislator. Legislation is to be the business of his life, just as jurisdiction is the business of the professional lawyer's life. It is with a view to this that his education, both general and special, is to be carried on, and that he is to serve the practical apprenticeship as an elector to which I have just alluded.

It will be said that the subjects which call for legislative interposition in advanced societies are so multifarious, that no special training, either theoretical or practical, can embrace them all, and that all we can do is to select honest and capable men, and leave them to be guided by specialists on each special occasion. I admit the truth of the allegation, but not of the inference. No previous education or experience can be so exhaustive as to send men into the legislative field equipped at all points. Nor ought such training in specialities to be attempted in the case of the professional politician. Special information can always be had from without; and it is not the want of it that gives to our legislation the uncertain, vacillating, and one-sided character which belongs to it. It is in the knowledge of principles—of the lines of march along which a consistent, firm, and comprehensive policy can alone be reached—that the ordinary class of legislators fall short. It is this that burdens our statute-book with the mass of mistaken and unenforceable enactments, in the readjustment and repeal

of which more than half its energies are spent. Now these principles, resting as they do on the very nature of things, are permanent, and, in so far as they have been discovered, can be taught; and it is a knowledge of them more especially which the professional politician ought to bring to the aid of the amateur legislators, who must continue, of course, to form the main body of his colleagues.

When the subject of principles, or of natural and, as such, unchangeable rules of action, is mentioned, and still more when the importance of theory and the necessity of forming ideal conceptions of the objects which we desire to realise are insisted on, I am aware that many persons jump at once to the conclusion that something is about to be said which they will not understand. Their minds consequently begin to wander in a sort of hopeless, aimless imbecility. "Give us something practical, for the love of heaven!" they exclaim; "give us facts!" and they seize on the first two or three facts they can get hold of, and forthwith propose that a legislative Union shall be formed or repealed; that a Land Act, a Coercion Act, or a Foreign Enlistment Act, or whatever else may be the fad of the day, shall be enacted. Now there probably never was a crisis in the history of our country in which an appeal to the ultimate principles by which society is governed was forced upon us by so many considerations and in so many directions as at present. The day has gone by for lazily groping our way by the farthing-candle of utility. Honest John Bull used to comfort himself with the notion that the choice between theory and practice was always open to him; and as the felicity of inquiring into the causes of things did not smile to him, the choice gave him no trouble. But times are changed; and unless he can make a stand for the faith that is in him, he is in great danger of being goaded into dry and thirsty Socialistic and Communistic regions, very unlike the green fields of Old England.

It is quite startling how rapidly a change of theory, which has been forced upon us by events, changes the whole drift of feeling and opinion. New rocks ahead endanger our course, and necessitate a new departure in legislation. Of this I mentioned an example in my introductory lecture last year, in the principles of centralisation and decentralisation. They are both true and sound principles—indispensable factors in the life of every progressive community; and yet, for the time being, either the one or the other almost exclusively determines the current of legislation. For many years—I cannot say how many, but for all the years of my conscious life—the principle of centralisation had reigned supreme. Men believed in great states, great cities, great factories, broad lands, and big farms. The world was to be governed by big

battalions, and big ships were to rule the waves. The biggest cannon that ever was cast could be silenced by a cannon twice the size; and, as there is no limit to the size to which cannon may be cast, men have gone on casting them bigger and bigger. Size, in a word, was omnipotent both in peace and in war. The only object of the art of war was to discover by what means the greatest number of human beings could be killed in the shortest time; the only object of the art of peace was to discover how the greatest number of them could be kept alive with the smallest expenditure of effort on their own part: and both these objects, it was thought, could best be attained by machinery. Hands, and eyes, and, above all, brains, except in the case of the inventors of machinery, were to have a long holiday. Leviathan had no use for such puny instruments. But when Leviathan was thus engaged in swallowing up the little fishes, lo and behold! Leviathan grew sick. There was what is called a "glut at the centre." His food disagreed with him, and the little fishes were sent swimming again into the ocean, free to flap their fins at their own sweet will. The tide had turned, and the principle of decentralisation was to have its day. Now this is the point, if I mistake not, at which we stand at the present time. We have been forced into a new road by the *cul de sac* in which our one-sided action had landed us; and the problem which now occupies all thinking men is how far this new road is to carry us. Our Continental neighbours still cling to their big battalions, and we still compete with them in big ships and big guns. The depressing and exhausting effects of this wasteful policy are everywhere felt; but they are not as yet distinctly perceived and acknowledged. It is otherwise, however, with the vast machine we call Parliament. It confessedly is no longer equal to the strain that has been put upon it. It cannot grasp both imperial and local affairs. If they are to be dealt with effectually, they must be dealt with separately; and the question of practical politics which before all other presses for solution is, How are they to be separated? What are imperial and what are local affairs?

Special answers to this question will have to be sought in all conceivable directions, and I cannot enter on them here. But there is one general answer at which, I think, we may arrive by looking at the question from the point of view of principle; and this general answer will indicate the lines along which special answers must be sought. The ultimate object of all legislation, whether local or imperial, and whatever be the department of human activity to which it has reference, is to set that activity free, to remove the impediments which stand in the way of its fulfilling its proper function and realising its true results. Legis-

lation does not, as I shall attempt to show you hereafter, supply or even stimulate activity. That function belongs to other factors, moral, intellectual, and physical. It merely sets it free to avail itself of these factors to the extent to which the inherent energy of the community may have enabled it to develop them. Now the *sine quâ non* of all free activity is order. If the factors which constitute life, whether it be political life or animal life, or even mere vegetable life, are to be brought into free and full action, the first requisite is, that they shall be prevented from conflicting with each other. There must be no "Boycotting." Order, not in itself, but as a means to an end, thus becomes the primary object of legislation. But order, thus regarded, depends on general and special conditions, and it is in the distinction between these two orders of conditions that we shall find the dividing-line between the functions of central and local legislation. The general conditions of order are in conformity with ethical principles. Beyond the lines that are traced by the constitution of the universe there is nothing but confusion. There is no debatable land between cosmos and chaos. In enforcing the Ten Commandments there never can be any encroachment either on local rights or on personal freedom; and this function, consequently, the community as a whole is entitled to retain in its own hands. It belongs, on principle, to the central power to see that no other power shall raise its hand either against the general life or its own. But if the central power be bound to perform this function, it is entitled to the means of performing it. It is entitled, not only to enact laws for this purpose, but to apply them and enforce them; and we are thus enabled, without descending from the region of principle, and quite apart from all special considerations, to resolve one of the knottiest questions of practical politics. We can declare unhesitatingly that the appointment of the judges and the command of the naval and military forces are imperial functions.

Having supplied guarantees for that universal order on which all activity and progress depend, the central power steps into the background, to reappear only when order is disturbed,—only when local forces, by coming in conflict with each other, impede their own action. These local forces depend for their energy on local peculiarities, which can be defined only locally. They are the result of ethnical and historical characteristics which are not common to the whole of any of the greater States of Europe, still less to a State, like our own, which stretches to all the quarters of the globe. No single legislative system can be made to embrace them all; and if it did, it would speedily become unworkable from its mere complexity. It is this latter occurrence which has produced the deadlock in our own system of parliamentary government.

We have been attempting to legislate at Westminster for an empire more varied in its legislative requirements than any that the world has ever seen, and the consequence is that the action of the heart is no longer strong enough to send the blood to the extremities. The attempt, in the case of our greater colonies, has been abandoned, and its failure even in the case of the Three Kingdoms, whose conditions are less dissimilar, is at length acknowledged. Here then, on principle, we arrive at a general definition of local or national, as we did of central or imperial, legislation. Its object is to determine the special conditions in accordance with which universal law may be locally realised.

It is in the sphere of local legislation that the interests, prejudices, and passions of classes and individuals come most frequently into collision, and here, consequently, the clearer views and cooler handling of the professional politician are called for not less than in the wider sphere of imperial legislation. The interests of landlords and tenants, of employers and labourers, of producers and consumers, and, above all, of the propertied and non-propertied classes, so often conflict, or seem to them to conflict, that it is scarcely possible they can be adjusted and harmonised by those by whom they are directly represented. For their own sakes, and for the sake of the community as a whole, it is often desirable that they should be in disinterested hands, and it is on this ground that the community still prefers, for the most part, to be represented by persons whom hereditary wealth has raised above the struggle for existence, and who, in virtue of the tranquillity and leisure with which they are thus permitted to look around them, are credited, not in general without reason, with exceptional insight into public affairs. But in democratic countries it is doubtful whether this class will retain their influence unless reinforced by those whose special culture, apart from considerations of birth or fortune, would commend them to general confidence, and whose interests would bind them to the community as a whole. Sooner or later, it is to be feared that causes similar to those which have led them to abandon municipal affairs may induce them to renounce the share in the national councils which they still covet as an honour. We should then be left with an idle and luxurious Plutocracy on the one hand, and a Democracy in constant danger of becoming the prey of demagogues on the other. The rude wrangling which already disgraces our Parliamentary debates, so unlike the dignified decorum of our courts of law, seems to presage such an event. But this contrast appears also to suggest the remedy. Even a small contingent of disciplined legislators, accustomed to regard legislation not as a privilege to be asserted, but as a duty to be performed, would do more to

support "Mr. Speaker" in maintaining order than all the rules of procedure that can ever be devised.

Such are the arguments, or a few of the arguments, in favour of the formation of a class of professional politicians. Let us now glance, in conclusion, at some of the objections to it and difficulties that would stand in its way. Politics cannot be a close profession, like law or medicine, because we must not exclude from the Legislature persons of exceptional aptitude, and such men often appear under the most unfavourable conditions. It is quite right, moreover, that special interests should be represented by those who are specially interested. It can thus only be a profession, the members of which offer their services to their fellow-citizens. Can it then be a paid profession? Not directly, I think, unless we adopt the system of payment all round. The line between professional and amateur legislators cannot be drawn with that degree of sharpness. But payment of members of Parliament all round is not alien to our earlier traditions either in England or Scotland. Stubbs, in his *Constitutional History* (vol. iii. p. 483), says, "The knights of the shire received each four shillings a day. This rate of payment was fixed by usage, or possibly by ordinance, in the seventh year of Edward II., and was observed from the beginning of the next reign, the rates of the preceding and intervening years having occasionally varied. These wages were collected by the Sheriffs from the communities of the counties and towns represented, and were a frequent matter of petition, in which almost every conceivable plea was alleged in order to escape the obligation." In Scotland, by the Act 1427, cap. 101, it was provided that all the commissioners should have their costages; and by 1587, cap. 114, all freeholders were taxed for the expenses of the commissioners of shires (*Wight's Inquiry*, pp. 51, 52). In recent times payment of members has been resisted in this country, from the fear that it would breed up a class of political adventurers and place-hunters, who would make a trade of the public service, and the unsuccessful members of which would always be ripe for revolutions, as they are in Spain and in the Spanish Republics of South America. But has this really been the effect of the experiment? The practice of foreign States has been so irregular as scarcely to afford any trustworthy indication of its results. In Spain itself the deputies are not paid at all (*Statesman's Year-Book*, 1884, p. 426), and in Portugal, the merest trifle, ten shillings a day, during the session of three months (p. 361). In several of the cautious and steady-going Teutonic and Scandinavian nations, on the other hand, the remuneration is considerable. In Prussia "members of the Second Chamber receive travelling expenses and diet-money from the State, according to a scale fixed by law, amounting to

twenty marks, or one pound per day. Refusal of the same is not allowed" (*ib.*, p. 121). In Saxony the members of both Houses are allowed twelve shillings a day during the sitting of Parliament (*ib.*, p. 148). In the Netherlands "the members of the Second Chamber receive an annual allowance of 2000 guilders, or £166, besides travelling expenses" (*ib.*, p. 342). In Switzerland, the remuneration, where any, is merely nominal; and in Italy the deputies get nothing at all, but are allowed to travel free, both by steamer and railway. In France both the senators and the deputies are highly paid. The deputies receive 9000 francs, or £360; the senators, 15,000 francs, or £600 a year (*ib.*, p. 61). These latter facts will not be very reassuring to most of us, and our confidence will not be strengthened when we learn that it is in the Argentine Republic and in Brazil that the payment of members reaches its maximum. In the Argentine Republic, "the members, both of the Senate and the House of Deputies, are paid for their services, each receiving £700 per annum" (*ib.*, p. 511). In Brazil senators receive a salary of £900 a year, though the annual income qualifying them for appointment is only £160; and deputies, who are rendered eligible by the possession of £80 per annum, receive a salary of £600, besides travelling expenses (*ib.*, p. 525). In the United States the sums actually paid exceed even those in Brazil, but the purchasing power of money is probably so much less that the real gain is the other way. "The salary of a senator, representative, or delegate in Congress, is 5000 dollars, or £1000 per annum, with travelling expenses" (*ib.*, p. 620). In Mexico the members of both Houses receive salaries of 3000 dollars a year. Canada, from her proximity to the United States, could scarcely fail to follow suit, and we find accordingly that each member of the House of Commons has an allowance of ten dollars per diem, up to the end of thirty days, and for a session lasting longer than this period, the sum of 1000 dollars, with, in every case, ten cents per mile for travelling expenses. The sum of eight dollars per diem is deducted for every day's absence of a member, unless the absence is caused by illness. There is the same allowance for the members of the Senate of the Dominion. Several of our Australasian colonies, also, have adopted the practice. *The Australian Handbook for 1886* informs us that in Victoria members are paid £300 a year, by way of indemnity for expenses. In Queensland the sum is £2, 2s. a day, but not exceeding £200 for each session. In New Zealand £210 was formerly given for each session, but in 1880 it was reduced by 10 per cent., to £189. In the case of New Zealand the payment is expressly stated to be for members of either House; in the other two cases, Victoria and Queensland, the phrase used is members of Parliament, which,

I think, must include both Houses, because the *Handbook* appears to be careful in the use of distinctive terms, where needful. No mention of any payment is made for the colonies of New South Wales, South Australia, West Australia, or Tasmania, so I suppose none exists in them.

I cannot say that these facts indicate to my mind any very definite conclusion. The conditions under which the practice existed amongst ourselves in former times, and in which the experiment is being tried abroad, differ so essentially from those which now exist in this country, as to take away all significance from the results, even if these results were better known to us than they are. What it is more important for us to consider is, that to some extent our hand has been forced by the adoption of the practice of paying their representatives by private associations—trades-unions, land-leagues, miners' leagues, and the like. The effect of this arrangement is to send mere delegates to Parliament, the only apology for whose presence is, that, to a certain extent, they act as witnesses. But whether valuable or not, their presence is inevitable, because the suffrage has been extended with the very object of enabling working-men to be represented by working-men. By a working-man is meant a man who works for his bread, and if we are to have working legislators, legislation must be made a bread-winning work. Private payment, even on a large scale, is so easily effected by small subscriptions, where numerous bodies are interested, that, unless we are willing to see it become far more prevalent than it is, we have only the alternative of forbidding payment in every form, or of substituting public for private payment. Private payment of members with a view to the advancement of special objects—class interests or party interests—is bribery; and there is just as much reason for forbidding the bribery of members as for forbidding the bribery of electors. The only difference between them is, that hitherto the former has been practised by the poor, the latter by the rich. But the rich, in these days, are in more danger of spoliation than the poor are of oppression; and if the poor require to club together and pay their representatives, may not the rich be forced to do the same? What guarantee have we that the practice of paying members, like the other practice of paying electors, shall not end in a mere trial of the length of purses? If the money element be allowed free scope, members may be bought out of Parliament as well as into it, either by caucuses or by millionaires. Who can tell what members might not be "squared"?

The payment of members is a subject on which I have changed my own mind, and with reference to which I have no right and no disposition to dogmatise. But, as at present advised, it appears to

me that the safest course probably would be for the State to give such remuneration as would enable an economical man to serve it in the capacity of a legislator, independently of private means, and then to forbid the acceptance of all other remuneration from whatever source. When once elected, members of Parliament would thus become public officers, holding their commissions from the community in its corporate capacity. Their position would thus be somewhat less dependent than that of paid members at present, and they might possibly have the moral courage occasionally to remind their constituents of their duties, in place of dwelling exclusively, as they now do, on their rights.

But apart from pecuniary remuneration altogether, the political career offers many compensations for the labours it imposes. It is the avenue to the highest offices and honours of the State, and though even these are not always direct sources of wealth, it is rare that wealth does not follow in their train. There are directions, moreover, in which it would be likely to be remunerative in an exceptional manner to those who adopted it as a profession. We have already a great deal of legislation by commission, and there is every probability that this will increase, as the rank and file of the members of Parliament come more and more to be representatives of special interests and industries. If persons who had received a general training in politics were to be had, I am persuaded that, from motives of mere convenience, they would be largely employed as commissioners, whilst all the minor offices of Government and all the permanent appointments would fall into their hands as a matter of course. For these latter, indeed, it might be suitably arranged that those who had taken political degrees should alone be eligible. These remarks apply to the Colonies, where the energies of the community are absorbed by the struggle with external nature, quite as much, if not more, than to the mother-country. An almost boundless field is thus thrown open to the professional politician.

I have been for many years a strenuous advocate for the development of our Faculty of Law in the political direction. This wider conception of the study of jurisprudence, as embracing that of politics, has long received recognition in the Continental universities, and you may judge of the clearness with which it is now being apprehended by our Transatlantic kinsmen from the following passage which I quote from the address delivered to the Law Class of Michigan University, last June, by Professor Henry Wade Rogers. After referring to the opinion of De Tocqueville, he continues: "It is because of this relation which exists between the lawyer and the State, because trained lawyers are a necessity to the State to aid in the interpretation and administration of the

Law, that the State is justified in establishing a law-school in this university, and in maintaining it at the public expense. And how appropriate it is that there has been established, in connection with it, a school of political science, where the student of the law may, in connection with his legal studies, learn something concerning the science of government" (p. 22).

It has given me great pleasure to observe the growing clearness with which the connection between politics and the profession of the law has in recent years come to be understood amongst ourselves. Of this, the proposal to throw the whole of the Private Bill legislation with reference to Scotland into the Court of Session is a remarkable instance. Nor must I forget the eagerness with which the younger members of the Bar have recently entered the political arena. We always had a good many of our men in Parliament, and perhaps the number was not greatly increased at the late elections. But never before had we so many candidates, and as most of those who failed were young aspirants, they may well hope for better luck another time.¹

¹ The following extract from a letter from my friend Mr. Westlake, Q.C., late M.P. for the Romford Division of Essex, will be read with interest: "I have long been of your opinion about the payment of members. Their payment by private associations, though probably it has not yet been abused, has always appeared to me to be likely to lead to great mischief. To extract money from his constituents' pockets, a candidate is under the temptation of making them promises impossible to fulfil, but by which the ignorant mass are taken in, so that one who is careful not to promise too much cannot get a hearing. No doubt there is the same temptation, more or less, in every case of candidature, but it is greater in proportion to the avoidable sacrifice which the candidate asks. If he had to be paid all the same, whatever he promised, then, whether the burden lay on the Treasury or on the constituency, attention would be more directed to the question who was worthiest of the place and its emoluments.

"People object to me the evils which they say have resulted in the United States from the payment of representatives. But to that there are two answers. *First*, a member of the House of Representatives receives 5000 dols. (£1000) a year, which in my judgment is a great deal too much. It has certainly induced many men, with the showy and tricky qualities that succeed too easily in meetings and canvasses, to take up politics as a profession—men who probably had neither the industry nor the solid qualities necessary for success in a profession. *Second*, the House of Representatives is a purely legislative body. Executive functions are entirely divided between the President and the Senate, and the Lower House of Congress can do very little, even indirectly, to influence their exercise. This prevents the Lower House from being an object of ambition to superior men, in anything approaching the same degree in which the Lower House is such an object in any country where parliamentary government exists. The only parallel case in any great European country is that of Germany, where the existence of Parliaments without parliamentary government reduces the Lower Houses to a repute only greater than that of the Lower House of Congress, because they cling to the hope of one day obtaining parliamentary government. Hence the professional politicians in the United States do not meet with sufficient competition from independent persons. I think that in England £300 a year would be remuneration enough. That sum would

enable a constituency to have the services of a working-man member if they desired it ; and I do desire that every class should be heard in Parliament through members belonging to it. The sum should be what would enable the M.P. to live in London, associating with other members on terms of reasonable comradeship, and to have his family in London, but not so as for *them* to associate at the public expense with the families of other members. And this I should put at £300 a year. You see I regard the matter from the point of view of the constituency and the class, not of the individual. When you speak of 'enabling an economical man, without private means, to devote his attention to politics,' I have a slight fear that you may mean a more liberal provision. If the income of an M.P. could be looked on as a provision for him and his family, equal to what he might get in the lower ranks of a regular profession, I should greatly fear that flashy and tricky men would prefer it (with all the additional chances in its train) to regular work."

XVII.

THE STORY OF THE CHAIR OF PUBLIC LAW IN THE UNIVERSITY OF EDINBURGH.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1887.

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EVERY civilised man is a born story-teller. The present is a mere point of time, and in itself is not even a luminous point. Before we have well apprehended it, it has become the past, and it is by the light which the past sheds on it alone that we apprehend it consciously, and that it projects its light on the future. It is to the conscious recognition of this light from the past, and of the way by which it has led us hitherto, that we apply the epithet of civilisation. By means of it alone rational activity becomes possible. The man who lives in the present is a barbarian, whatever be the other conditions of his existence. To him his own life is unintelligible: a mere time-flake on the ocean of eternity; it brings him no inheritance and leaves him nothing to transmit. His activity is a succession of leaps in the dark. The stage of civilisation, moreover, stands almost always in a very close relation to the measure of historical knowledge; and it is marvellous with what rapidity families and nations and races that have ceased to be historical slip back into barbarism. When the footprints of preceding generations are obliterated, each new generation has to begin the work of ages afresh, and it is not surprising that it should often prove unequal to the task. When this task has been long neglected its performance becomes impossible to those on whose ancestors it was incumbent, and it is for this reason that the East must now look to the West for its own forgotten story.

As regards the individual, the sphere within which the duty suggested by these considerations is imposed is determined by his character and the circumstances of his life. The function of the historian, in any wide or general sense, does not lie at the door of the majority even of civilised men. Their duty is, by availing

themselves of such gifts and opportunities as may be bestowed on them, to contribute material for a history that shall be creditable to their generation. But within certain limits, every father of a family is bound to be its historian. I do not say that it is his duty to become a genealogist and to trace all the ramifications by which he and his kindred are intertwined with other families, or to determine the extent to which their fortunes were affected by distant events. If his race was illustrious, that will be done for him by others; if it was obscure, he may be pardoned if he allows its earlier history and less immediate fortunes to be forgotten. But with the recent history of the family, its history for the last three or four generations, we shall say, the case is different. That is, or ought to be, known to him as it can be known to no one else; and if he fails to transmit it he squanders the birthright of his posterity.

Now it appears to me that the holder of a public office stands to the public, to his patrons, and above all to his successors, very much in the position of the father of a family in this respect. If it is an ancient office he may leave its early history to the general historian. But its recent history, that history by which its present utility must be judged and its adaptation to the exigencies of the immediate future must be determined, is, or ought to be, known to him as it can be known to no other man. He may be prejudiced, it is true; but he cannot well be ignorant, and when he is entering on his twenty-sixth session, as is my case to-day, and on his seventieth year, as will be my case three days hence, it is scarcely likely that his vision should be greatly distorted by self-interest. On these grounds it appears desirable that I should now tell you the somewhat curious story of this chair, and give you some indication of my own experience as its occupant.

A Faculty of Law was included in the original scheme of each of the three older Universities of Scotland, and both at St. Andrews and Glasgow canon and civil law were occasionally taught. Bishop Elphinston, by whom King's College in Aberdeen was founded in 1494, had himself been a professor of canon law at Paris, and of civil law at Orléans; and in his statutes he enacted that the Canonista at Aberdeen should teach after the manner of Paris, and the Legista after the manner of Orléans. To him, too, is ascribed the suggestion of the enlightened statute of King James IV. (1496, c. 3), which enacted that barons and freeholders should send their sons and heirs to the grammar-schools till "they be competentlie founded and have perfite Latine, and thereafter to remain three years at the schules of art and jure, swa that they shall have knowledge and understanding of the laws." In 1501 Elphinston further obtained an indulgence from the Pope, with the

object of encouraging the study of civil law amongst ecclesiastics of all classes, with the curious exception of the Mendicant Friars.

The Reformers' scheme for remodelling the University of St. Andrews assigned to St. Salvator's College the privilege of granting degrees in law after one year's course in ethics, economics and politics, and a four years' course under two readers in municipal and Roman law.

In Edinburgh the first serious effort to introduce the scientific teaching of jurisprudence appears to have been made by Reid, Bishop of Orkney, who, amongst his many offices and preferments, was President of the Court of Session. Reid left a bequest for the endowment of a School of Arts and Jure, the object of which appears to have been to carry out the provisions of the statute just referred to. But, as in the case of another "Reid-bequest"¹ that we know of, the founder's will was treated with scant respect. After tracing this discreditable transaction through its various stages, Sir Alexander Grant concludes his narrative thus: "And so it came to pass that the only memorial of Bishop Reid's munificent purpose to endow a college 'of Arts and Jure' in Edinburgh existed for some time (though it has long since passed away) in the name given to 'fourteen little chambers' which formed part of the original College buildings, and which were called 'the old Reid chambers.'"²

Another miscarriage took place when, in 1500, a professorship of laws was actually founded by the Lords of Session, the Town Council, the Advocates and the Writers to the Signet. Two professors were successively appointed to it, but for some mysterious reason they taught nothing but classical literature.

Subsequent to the foundation of the Court of Session it is probable that, in addition to the instruction by apprenticeship which must always have existed, instruction of a more scientific character, both in civil and municipal law, was given privately by members of the Bar. This, however, was less with a view to the completion of a legal education in Scotland than by way of preparation for the foreign study which long after the foundation of the University in 1582, and even after the Union in 1707—down indeed to the French Revolution—was considered indispensable for admission to the Bar. But slight and elementary as it no doubt was, I think we may assume with some confidence that the teaching of jurisprudence in Scotland, even at this early period, was not destitute of a scientific character. In addition to the care with which the connection between classical and legal studies was maintained, and the special provisions which we find

¹ For the Music Chair.

² Grant, vol. i. p. 169.

for a philosophical and historical groundwork being laid in ethics, economics, and politics, this assumption seems to be warranted by the preponderance of the ecclesiastical over the lay element on the Bench. It was by the canonists rather than the civilians that the study of the *jus naturale*, as a substantive branch of science, was carried on, and it was by them, as I shall show you hereafter, that its importance as the basis of the *jus inter gentes* was pointed out. Scotland was so entirely separated from the Roman Catholic world by the Reformation as scarcely to have felt the influence of the Spanish School of Jurisprudence, which culminated in Suarez of Granada, and to which the Protestant writers who followed them owed more than they were willing to acknowledge. It is possible that the teaching of Alberigo Gentili at Oxford may not have been wholly unheeded in Scotland; but though Gentili was a Protestant he was not much of a philosopher, and it was to Grotius and his followers, unquestionably, and to the intimate relations which then subsisted between the intellectual life of Scotland and of Holland, that we were indebted for our introduction to the study both of scientific jurisprudence in general, or natural law as it was called, and of the law of nations. It was from this source that Lord Stair drew the inspiration which enabled him to bring science to bear on our municipal system with a definiteness of conception and clearness of expression which has never since been equalled by our text-writers; and it has always seemed to me probable that it may have been at Stair's suggestion that this particular chair, if not the Faculty of Law itself, was founded. Stair's great work was published in 1681 and he died in 1695, twelve years before the foundation of the Public Law chair; and there consequently can be little doubt as to the correctness of Sir Alexander Grant's conjecture that it was to the great Carstairs—"Cardinal Carstairs" as he was called—who was Principal of the University from 1704 to 1715, that we owe it more directly. Still it is worthy of remark that Stair went to Holland in 1682, and Carstairs returned to Holland after his secret mission to Scotland in 1685, and that they both remained in Holland till 1688, when they returned with the Prince of Orange. From 1685 to 1688 these two remarkable men were together, and in constant personal intercourse, in Holland. Both were philosophers, theologians, and politicians, and Stair could scarcely have failed to point out to Carstairs the relation between these subjects of common interest and his own specialty as a jurist; whilst Carstairs, who had studied at Utrecht, would be able to explain to Stair the arrangements by which this relation was recognised in the Dutch Universities. There was another Scottish exile of distinction in Holland at this time, who also

formed one of the party that landed at Torbay, viz. Robert Dundas, the second Lord Arniston; and it is interesting to reflect that during the long and stormy passage the three Scotsmen may have talked over the prospects of Scottish jurisprudence in the intervals between the political and ecclesiastical discussions which no doubt mainly occupied them. Dundas was not a man of the same intellectual calibre as Stair or Carstairs, but he was a man of cultivated and scholarly tastes; and as he lived till 1729, his Dutch experiences may have enabled him to aid Carstairs with his counsels.

But from whatever direction the influences may have come which led to the formation of the Faculty of Law, we are not left to conjecture as to the School of Jurisprudence of which this particular chair was an offshoot. One of the students in this class found in an old bookstall, and kindly brought to me, the curious little book which Sir Alexander Grant has described in a note.¹ It is a compendium of Grotius's *De Jure Belli et Pacis*, by William Scott, who was one of the regents at the time. It is dedicated to the Lord Provost and Town Council, and on the copy in the library is written *ex dono Authoris, 4^{to} Aprilis 1707*. "In a Latin preface Scott tells us that the book had been printed for the use of a private class, to whom he had previously dictated its contents as a preparation for wider studies, and he gives in full his opening address delivered in his private class-room (*in auditorio privato*) on the study of Grotius. This shows," Sir Alexander continues, "that there was some little demand among the students of the college for lectures on the Law of Nature and Nations. It is possible that Carstairs may have suggested the delivery of these lectures as a first step towards the foundation of a chair. But under the circumstances it is remarkable that the chair when founded should have been given to Areskine and not to Scott." The coincidence between the date of the publication of Scott's book and the foundation of the chair, 1707, may be taken, I think, as indicating that Scott was a candidate for it. Its dedication to the Town Council seems to show that it was on their influence that he relied; and their leaning in his favour may have had something to do with the bitterness with which they resented what they regarded as the high-handed action of the Crown in placing Areskine in the University without their consent.

From all these circumstances, I think, you will not doubt that when this chair was ultimately founded in 1707, its object, as Sir Alexander Grant has said, was to provide "a scientific and philosophical basis for a future Faculty of Laws, in imitation perhaps of the Dutch Universities."² The School of Grotius was

¹ Vol. i. p. 233.

² *Ibid.*

that which was then uppermost in the minds of Scotsmen, and the Faculty of Law from the first was manifestly intended to cover the whole field of Jurisprudence and to embrace legislation as well as jurisdiction.

1. Its first occupant was CHARLES ARESKINE, or Erskine, of Tinwald, 1707-1734. He came of a race, or rather I ought to say of races, which had been distinguished in the law long before him, and continued to be so long after him. "His grandfather, the Honourable Sir Charles Erskine of Alva, fourth son of John Earl of Mar and of Lady Marie Stewart, daughter of the Duke of Lennox, married Mary Hope, second daughter of Lord Advocate Sir Thomas Hope. Of this marriage was born Sir John Erskine of Alva, father of the Professor. His mother was Christian, daughter of Sir James Dundas of Arniston. Erskine is said to have studied for the Church; but he soon abandoned the idea of taking orders. When only twenty he was appointed one of the Regents of the University of Edinburgh. He held this office, in which he taught Logic, Ethics, Metaphysics, and Natural Philosophy, until 1707, when he was made Professor of Public Law."¹ It is not quite fair to say, as Sir Alexander Grant has done, that there is no indication of his having taught, except "a brief inaugural address, written in Latin, upon God as the fountain of Law."² Mr. Omond, in a note, gives the following advertisement from the Scots *Courant* of 12th to 14th November 1711: "Mr. Charles Erskine, her Majesty's Professor of Public Law in the University of Edinburgh, designs to begin his private Lectures on the Laws of Nature and Nations, on Friday next at 5 o'clock in the afternoon, at his lodgings in Fraser's Land."³ What came of this pious design I cannot tell, but I fear it must be admitted that Areskine was not a very zealous professor. Immediately after his appointment he went to Utrecht to study law. This may have been in order to prepare for the duties of his chair, as well as with the view of his admission to the Bar; and his being abroad during the Jacobite rising in 1715, in which several of his kindred came to grief, was a proof of his political discretion, and no disproof of his professorial zeal. His subsequent travels with his brother Robert, physician to Peter the Great, when he wrote to his wife that "she must be thinking he had taken service with the Czar of Muscovy," may have been very instructive to him as an international jurist. But any aspirations after distinction in that capacity which he may originally have cherished were speedily extinguished by the temptations held out to him by his professional

¹ Omond's *Lord Advocates of Scotland*, vol. ii. p. 1.

² Grant, vol. ii. p. 314.

³ *Lord Advocates of Scotland*, vol. ii. p. 1.

success and the Court-favours which he owed to his family connections, and still more to the patronage of the great Duke of Argyll. His reluctance to sever himself from an office which brought him in contact with the philosophical studies of his youth may probably have been the cause of his continuing to hold the chair for the long period of twenty-seven years. But how incompatible the discharge of its duties must have been with his other avocations will be seen from Mr. Omond's narrative of his subsequent career. He was called to the Bar on the 14th of July 1711. In 1714 he was an Advocate Depute. He became one of the leaders of the Bar; purchased the estate of Tinwald in Dumfriesshire; and in April 1722 was returned to Parliament as member for that county.

In May 1725, when Forbes became Lord Advocate, Erskine was appointed Solicitor-General. On this occasion he received a special mark of royal favour. Hitherto the only Counsel allowed to be placed within the bar had been the Lord Advocate; but on this occasion a change was made. The new Solicitor-General presented to the Court a warrant under the sign-manual, subscribed by the Secretary of State for Scotland, in these terms: "Whereas we have appointed Mr. Charles Areskine, advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a further mark of our royal favour, it is our will and pleasure that a seat be placed for him within the bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly." At the general elections of 1727 and 1734 he was returned for Dumfriesshire. In 1737 he succeeded Forbes as Lord Advocate, and strenuously supported the Scottish policy of the Walpole Ministry till 1741. At the general election of that year Sir John Douglas of Kelhead became member for Dumfriesshire; and Lord Advocate Erskine was returned for the Sutherlandshire district of burghs. His election was, however, declared void in the following year, and he resigned office. His successor was Robert Craigie of Glendoick, to whom he wrote the following pleasant letter of congratulation: "It's commonly believed we love our heirs but not our successors, and sometimes we don't love our heirs because they are to be our successors. However this is not the case with me; you have been mentioned to the King by the Marquis of Tweeddale as my successor, and I heartily agree to it, and wish you success and prosperity in the office. You are happy in having to do with a patron who is a man of truth and honour, and this is a great encouragement to you. To show I'm sincere in all this, I have used my best endeavours you should be elected in my room,

the election being found void." He returned to practise at the Bar; but there was a vacancy on the Bench in November 1744, and he received the appointment. Four years later he succeeded Fletcher of Milton as Lord Justice-Clerk; and died, after filling that post to the satisfaction of the country, in April 1763."¹ "As a lawyer," says Mr. Fraser-Tytler,² "he was esteemed an able civilian. He spoke with ease and gracefulness, and in a dialect which was purer than that of most of his contemporaries; as a judge his demeanour was grave and decorous, and accompanied with a gentleness and suavity of manners that were extremely ingratiating."

2. WILLIAM KIRKPATRICK, 1734-5. Areskine was succeeded by his son-in-law, William Kirkpatrick, third son of Sir T. Kirkpatrick, second baronet of Closeburn. He sat in Parliament for the Dumfries Burghs from 1725 to 1747. In the latter year the Duke of Queensberry received compensation for his heritable Sheriffship, and William Kirkpatrick was appointed to the office. He died in 1777. He married Jean, third daughter of his predecessor. It is thus obvious that the chair was vacated by Areskine in his son-in-law's behalf when he himself was Solicitor-General, and when that son-in-law was Sheriff of Dumfriesshire and member for the Burghs. Mr. Kirkpatrick's son took the name of Sharpe on succeeding to the Hoddam estates, and was the well-known wit and antiquarian Charles Kirkpatrick Sharpe. William Kirkpatrick held the chair only for one year, and I grieve to say the solitary fact connected with his tenure of it that has come down to us is that he sold it to his successor for £1000. How nobly one of his descendants is atoning for the academical shortcomings of his ancestor I need not tell you.³

3. GEORGE ABERCROMBY, OF TULLIBODY (1735-1759), was a country gentleman of good family. He was born in 1705, and died in 1800, within a few weeks of the completion of his 95th year. He was the father of General Sir Ralph Abercromby, and the grandfather of Lord Dunfermline, and he is represented by the present Lord Abercromby. Like his father he was called to the Bar, and they both lived to become its oldest members; but he never practised. Of his professorial career of fifteen years we know very little. Lord Dunfermline, in his *Life of Sir Ralph*, says that "during several sessions Mr. Abercromby gave lectures in the University on the Law of Nature and Nations," and Sir Alexander Grant says that in 1741 he was lecturing on Grotius. How long he lectured we do not know. His grandson says he

¹ *Lord Advocates of Scotland*, vol. ii. p. 1, *et seq.*

² *Life of Lord Kames*, p. 38.

³ John Kirkpatrick, Professor of History.

was "distinguished for his industry, his love of knowledge, and his vigorous and comprehensive understanding." Notwithstanding these good qualities, however, he probably did not succeed as a lecturer. Scottish students are apt to become impatient of a professor who condescends to mere tutorial work, and, if Abercromby had nothing of his own to tell them, it is not surprising that they should have tired of his prelections on Grotius. In 1750 he made over the chair to his son-in-law, Robert Bruce,—whether for a pecuniary consideration or not does not appear.

4. ROBERT BRUCE, OF KENNET, 1759-1764. Of Mr. Bruce as a professor we know nothing. He held the chair for only five years, and was raised to the Bench by the title of Lord Kennet. He was great-grandfather of the present Lord Balfour of Burleigh. Whether he lectured or not I have been unable to discover, but as he is said to have had the character of being an unusually pure, painstaking, and conscientious judge, at a time when these qualities were not so common as they are now, it is scarcely probable that he held an office the duties of which he made no effort to perform. He died in 1785.

5. JAMES BALFOUR, OF PILRIG, 1764-1779. He too was a country gentleman, and lived in the fine old castellated house, between Edinburgh and Leith, which we all know. Nor has his shadow in this respect grown less, for though his representatives have not, like those of his two immediate predecessors, reached the peerage, they have retained their position, and have recently had a large accession to their fortune. But Balfour was more than a Scotch laird; he was a Scotch philosopher; and if any Scottish Raphael should paint us a picture of the School of Modern Athens, his figure would appear in the background, behind the grander images of Stewart and Ferguson and Hamilton and Hume. In his relations with the latter his name crops up in all the histories, and if I were dealing with the chair of Moral Philosophy, which he held from 1754 to 1764, I should have a good deal to say of him, in connection both with Hume and with Lord Kames. As Professor of Moral Philosophy Sir Alexander regards him as having been simply a failure, and his removal to the chair of Public Law in order to make way for Adam Ferguson—an arrangement which was effected by one of those scandalous transactions of buying and selling of which there were so many instances—must have been a prodigious gain to the University. But though "there seems little reason to doubt that Balfour was not a brilliant professor"¹ nor a brilliant man, his contemporaries spoke of him with far greater respect than the anonymous writer in the *European Magazine* in 1783, from whom Sir Alexander's

¹ Grant, vol. ii. p. 338.

conception of his character seems to have been chiefly derived. In speaking of his criticisms of Lord Kames's views on liberty and necessity, Mr. Fraser-Tytler says: "It is with pleasure we remark that the author of *Philosophical Essays* has afforded an example of a candid, liberal, and truly philosophic spirit of inquiry."¹ "Mr. Balfour was likewise the author of *A Delineation of Morality*, and a small volume entitled *Philosophical Dissertations*. The principal object of these works is an examination of the doctrines contained in David Hume's *Essay on Human Nature*, and his *Inquiry concerning the Principles of Morals*. The strongest testimony to the merits of Mr. Balfour is that of Mr. Hume himself." Mr. Tytler here refers to a curious letter from Hume to Balfour, the studied urbanity of which however, as it seems to me, only partially hides a vein of sarcasm, more characteristic of the writer than complimentary to the recipient.

Balfour was no match for Hume, and his writings possess no absolute or permanent value. But whatever were his other qualities, his industry, at all events, must have been considerable, for during almost the whole of the ten years that he held the chair of Moral Philosophy, from 1755 to 1761 he also acted as Sheriff-Substitute of Edinburgh. Even so late as 1764, the year in which he was transferred to the chair of Public Law, traces of him are to be found in the Diet Books of the Sheriff-Court.²

It is singular that the resignation of his judicial office should apparently have been coincident with his transference from the Faculty of Arts to the Faculty of Law in the University, and it is disappointing to find no proofs of his activity as a jurist, either academical or scientific. The author of the notice of him in the *Dictionary of National Biography*, who is, I believe, a connection of the family, makes no mention of his having lectured on Public Law at all, though he adds two facts of some interest to what was otherwise known of him, namely, that he studied at Leyden, and that his mother was a grand-aunt of Sir William Hamilton. But not much of the genius of that great man can be claimed for him, and I fear we must be contented to sum up his character with Mr. Fraser-Tytler's statement that he was "an ingenious, modest, and worthy man, who spent a long life in the practice of those virtues which it was the object of his writings to inculcate."³

6. ALLAN MACONCHIE, OF MEADOWBANK, 1779-1796. With the possible exception of Areskine, Maconochie was the ablest man who ever filled the chair, and he is the only one to whom

¹ *Life of Lord Kames*, vol. i. p. 141.

² Letter from Sheriff Rutherford, 5th October 1887.

³ *Life of Lord Kames*, vol. i. p. 140.

posterity gives credit for having lectured with success, even for a time. Lord Cockburn, who knew him only in later life, was estranged and bewildered by the metaphysical turn of his mind, and is a somewhat unwilling witness in his favour. He does not mention him as a professor at all, and, even as a judge, does not speak of him in terms of such enthusiastic admiration as Lord Brougham and Lord Jeffrey. Still the sketch of his intellectual character he has given us shows how exceptional must have been his qualifications for an academical appointment, and, above all, for the academical appointment which he held.

"His peculiar delight and his peculiar power," Cockburn says, "was in speculation, chiefly as applied to the theoretical history of man and of nations. He acquired great skill in the use of his metaphysical power, both as a sword and as a shield, in the intellectual contests in which it was his delight to be always engaged. He questioned everything; he demonstrated everything; his whole life was a discussion. This, though sometimes oppressive, was generally very diverting, and gave him a great facility in detecting and inventing principles, and in tracing them to their sources and to their consequences. Jeffrey describes this very well when he said that while the other judges gave the tree a tug, one on this side and one on that, Meadowbank not only tore it up by the roots, but gave it a shake which dispersed the earth and exposed the whole fibres."¹

How long Maconochie taught it is difficult to determine. Bower, who is confirmed by other authorities, says he lectured only for two sessions, owing to the extensive increase of his practice at the Bar. But it seems scarcely likely that he abandoned on so short a trial a task which must have had great attractions for him, and for which he had taken the trouble to prepare a course of lectures. He knew, indeed, but too well, that he could hold the chair as a sinecure, and could thus reimburse himself for the £1532, 18s. 2d. which was the sum he paid for it to Balfour. But he can scarcely have been the man his contemporaries took him for, if, at such a period of history as the seventeen years of his tenure of the chair covered, he was willing to exchange the interests of science and of mankind for those of his clients in the Parliament House, even with the ultimate temptation of a seat on the Bench. We are told that he did not succeed in attracting a class, and this Lord Jeffrey ascribed to the unintelligible or, at all events, unteachable nature of the subject—a subject which, with all his brilliancy, I fear neither Lord Jeffrey himself nor the Commissioners to whom he addressed his observations understood. "Mr., afterwards Lord, Jeffrey," says Sir Alexander Grant, "told the Commissioners of 1826 in reference to the Chair of the Law of

¹ Cockburn's Works, vol. ii. p. 124.

Nature and Nations, 'It was taught by a succession of able persons in this University, among others by the late Lord Meadowbank, than whom no man was more full of discursive knowledge and originality; yet in his hands, as well as in those of his successors, it proved in practice a complete failure, so that they could hardly get through the course with a larger attendance than is now round the table of the Commissioners.'"¹

Had Lord Stair been in Lord Jeffrey's place he would have given a very different account of the affair. Bringing his own philosophical instincts and his acquaintance with foreign schools of learning to bear on it, he would have told the Commissioners that the conditions on which the experiment had been tried in the University of Edinburgh were not such as to render success possible. The subject, which he regarded as the very root of jurisprudence on which Carstairs designed that the Faculty of Law should be based, had never been recognised even as a branch of any organised system of legal teaching whatever. Its study was not imposed as a condition for admission to the Bar; still less, of course, to the other branches of the profession. Shallow and thoughtless wittings, led astray by Rousseau and his followers, made stupid jokes about the *jus naturale*, the meaning of which they ought to have learned from the Roman jurists whom they pretended to have studied, and the chair was openly bought and sold with the consent of the Lord Advocate and the Town Council. Maconochie thus fell on a thankless and unappreciative though an admiring generation; and the spirit of the age, against which he was not strong enough to struggle, had probably more to do with his failure than either the intrinsic character of his subject or his own hungering after the loaves and fishes of the Parliament House. Had half the salary which he received as a judge been offered to him as a professor, had he been consulted by Government on questions of International Law, or occasionally employed as a jural assessor in the negotiation of a treaty, as is the custom on the Continent, and had the ultimate prospect of such honours as are now conferred on physicians and physicists and philanthropists been held out to him, he might have remained in the University all his days, and left a name in Scientific Jurisprudence as cherished in Scotland as that of Stair himself, and far more widely known. But let us not dwell regretfully on might-have-beens that were not to be. By preventing as a judge the candle of principle from being hid under the bushel of precedent in the Parliament House, Maconochie did good service in his day, and his judgments still enjoy professional consideration. But as a teacher of science, all that remains of him is the following sketch of his course in Hugo Arnot's *History of Edinburgh* :—

¹ Grant, vol. ii. p. 316.

"Mr. Maconochie destines his course for gentlemen who have nearly completed their education at the University on the most liberal plan. He traces the rise of political institutions from the natural characters and situation of the human species; follows their progress through the rude periods of society; and treats of their history and merits, as exhibited in the principal nations of ancient and modern times, which he examines separately, classing them according to those general causes to which he attributes the principal varieties in the forms, genius, and revolutions of governments. In this manner he endeavours to construct the science of the spirit of laws on a connected view of what may be called the natural history of man as a political agent; and he accordingly concludes his course with treating of the general principles of municipal law, political economy, and the law of nations."¹

We may here, I think, find traces of Montesquieu; and, apart from the influence which Maconochie's frequent residences in France must have had upon him, it is not wonderful that Montesquieu's teaching should have been supplanting that of Grotius in his mind, when we consider that Europe had just been flooded with twenty-two editions of the *Esprit des Lois* in eighteen months after its publication. The lectures, I believe, are in the possession of the Meadowbank family, and it seems worthy of consideration whether they ought not still to be given to the world. Their intrinsic value may have been lessened by time, but they could scarcely fail to be important contributions to the history of opinion. Like the other celebrities of his time, Maconochie appears in Kay's *Portraits*. His physiognomy is grave and thoughtful, and, one can well imagine, must have been felt as somewhat "oppressive" by so gay a spirit as Cockburn's. Kay has also a pretty elaborate notice of him, and it is interesting to us to know that he was one of the founders of the Speculative Society, to which many of us owe so much. On being raised to the Bench he took the title of his estate, as is the custom in Scotland, and was the first Lord Meadowbank, his son Alexander, in accordance with the well-known jest, having been Lord Meadowbank "also, but not like-wise."

7. ROBERT HAMILTON, 1796-1832. Though Lord Jeffrey spoke of Maconochie's successors, he can scarcely be said to have had a successor at all; for Mr. Hamilton neither taught, nor, apparently, was expected to teach. The Bishop's teinds on which the chair depended for its endowment having been mostly carried off by augmentations to the stipends of the ministers in the parishes on which they were allocated, an annuity of £200 a year was granted him from the Consolidated Fund. But this did not

¹ Arnot's *History of Edinburgh*, p. 305.

bring the salary up to its original value, and Hamilton was permitted to hold the chair as an acknowledged sinecure for the rest of his days. On his death in 1832 no new appointment was made, and thus the chair from which it was intended that the Faculty of Law should take its tone, and by means of which it was expected that it would assert its place in the scientific world, was consigned for the next thirty years to the lumber-room of the University. There is no reason to suppose that where Maconochie failed Hamilton could have succeeded, but under more favourable conditions success, even in his case, does not seem to have been impossible. He is said to have been a considerable antiquarian, and, along with his friend Sir Walter Scott, was one of the Principal Clerks of Session. I believe he was a Hamilton of Gilberscleugh, and was connected with the Belhaven family.

Such then is a brief and imperfect sketch of the fortunes of this chair and of the characters of its occupants. They were all men of ability, who succeeded in other and, to them, more tempting careers. Three of them, as we have seen, became judges of the Court of Session, and one of these rose to the dignity of Lord Justice-Clerk. Two, if not more, were members of Parliament. They were all cultivated gentlemen, two having had the special qualification of having previously been Professors of Moral Philosophy. Lastly,—what was an element of success of greater value in their day than in ours,—they were all men of family, and two of them are now represented by peers.

Strange as was the method of their appointment, moreover, there was not one bad appointment amongst the whole of them. There was not one of them who, under other conditions, might not have made a creditable professor, and there were two of them who, had they persevered, there is every reason to believe would have distinguished themselves as philosophical and international jurists. But they did not persevere, no one persevered, no one succeeded, and the consequence was that, when I was appointed in 1862, I had neither precedents nor traditions to guide me.

Nor was this defect supplied by the instructions which I received. The Ordinance of the Commissioners, it is true, was simple and intelligible. All that I was called upon to do was to deliver forty lectures on International Law during the Winter Session. For this light task the not inadequate remuneration of a salary of £250, together with such fees as I might be able to gather, was assigned to me. But, on the other hand, by the commission which was issued to me by the Crown, I was appointed "Professor of Public Law and of the Law of Nature and Nations,"—the old title of the chair, after mature deliberation, I was told, having been, wisely as it seemed to me, retained. No less than

four branches of the science of Jurisprudence of great importance, each of which in fully equipped Faculties of Law is represented by a separate course,—viz. (1) Public Law, the *Jus Publicum* of the Romans, the *Staatsrecht* of the Germans, what we loosely call Constitutional Law; (2) Natural Law, the *Jus Naturale*, the Philosophy of Law, or Jurisprudence in its general and more strictly scientific sense; (3) the Public Law of Nations, *Jus inter Gentes*; and (4) Private International Law, the *Jus Gentium*,—were thus handed over to me.

Of the first, which had given its name to the chair, Public Law, I felt at once that I was relieved by the institution of a Professorship of Constitutional Law and History; and, though in some aspects it had hitherto been my favourite study, I consigned it, except in so far as it might be necessary to go into it for international purposes, without reluctance to my eminent colleague Professor Cosmo Innes. But there still remained the Philosophy of Law and the Public and the Private Law of Nations.

Many esteemed friends in the Parliament House recommended me to confine myself to the latter subject, as that which was of the greatest practical importance and most likely to attract a class. Against this temptation I at once closed my ears. I was deeply impressed with the importance of the Philosophy of Law as the foundation of Jurisprudence in all its branches. I had already made preparations for a treatise which I had intended to publish on the subject, and now that I had become its academical representative I was resolved to teach it, better or worse, as ability might be granted me. This resolve was strengthened by the further consideration that the two branches of Positive Law I was subsequently to teach rested on it in a special sense, and that the founders of the chair, under the guidance of Carstairs, had adhered to what might be called the tradition of the Fathers, and had coupled the Law of Nations with the Law of Nature.

But how was all this to be accomplished? That I should dispose of three such subjects in forty lectures, with such a measure of completeness as to give any real academical value to my teaching, was plainly impossible. The only course left open to me was that, with the consent of the *Senatus*, I should abandon the easy lines which the Commissioners had traced for me, and accept the burden of a regular winter course of five days a week. Permission to adopt this arrangement was readily granted me, on condition that my fee, £3, 3s., should not be increased; and I must, consequently, have delivered about a thousand lectures gratis. I mention this latter fact, not for the purpose of enhancing the value of my own services, which may or may not have been increased by the larger space over which I found it necessary to extend them, but in order

to indicate the amount of labour which will fall to my successor should he feel himself under a similar necessity, and which he may not be willing to perform on the same conditions. In my own case the sacrifice involved in the exclusive devotion of my time and energies to the duties of the chair was not considerable. The occupation was the most attractive one that could possibly have been assigned to me, and, if the pecuniary remuneration was scanty, my ambition was stimulated by the reflection that the position opened avenues to a wider and perhaps more permanent reputation than any other within the range of the profession. Though not without much anxiety and many misgivings, I consequently entered with zeal and hope on what was to so great an extent a self-imposed task, and to the pride and pleasure which I have all along felt in its discharge I ascribe the comparative success which has attended my efforts. In the hands of my far abler predecessors it was a secondary occupation, which they took up or laid down as the exigencies of practice rendered possible or convenient, and to this circumstance, as I have said, far more than to either the unattractiveness of the subject or their inability to teach it, is, in my opinion, to be ascribed their failure to obtain for it a permanent place in the University and the recognition of the profession. It is to be remembered, moreover, that attendance on the class in their time was wholly voluntary, whereas on my appointment it was made compulsory for the LL.B. degree, and in 1866 was imposed by the Faculty of Advocates on all entrants to the Bar.

Notwithstanding the gloomy forebodings of my professional friends, the philosophical portion of the course proved from the first to be the most attractive to the students. Students of theology and others frequently came solely on account of it; the attendance on it was always more regular than on the other branches, and in it the best examination-papers and the best essays were written. The reason of this I believe to have been that, in addition to the naturally thoughtful and earnest character of Scotsmen, our Scottish students are specially well prepared for this branch of study by the excellent training in Logic and Ethics which they receive in our Faculties of Arts. In this respect it has always appeared to me that our M.A.'s contrast favourably with English graduates, and I regard it as a reason why we should be very careful in interfering with the curriculum for our Arts degree. As a preliminary to the degree of LL.B., at all events, I am decidedly of opinion that no Arts degree from any University ought to be accepted which does not embrace Logic and Ethics. In these, as in other branches of knowledge, men of brilliant ability and of exceptional industry will, no doubt, supply the defects of their early education;

but, as regards the majority of students, it is simply impossible to teach them Scientific Jurisprudence unless they bring a reasonable acquaintance with these ancillary subjects along with them. The students who attend the class of Public Law, having for the most part already graduated in Arts, and all of them being grown men, I have always treated them as friends and fellow-workers, and no words could be too strong to express the consideration and courtesy with which they have invariably behaved to me.

In dealing with the chair in future, two courses manifestly suggest themselves for consideration. Either it may be retained substantially on its present footing as a single chair, or it may be broken up into two or three separate chairs or lectureships, as in the Continental Universities. In favour of the first course there is perhaps most to be said. Premature specialising is the curse of our present academical life, and as few students would be willing to attend additional lectures, unless the whole subject were presented to them in a single course, there would be great risk of their becoming imperfect and one-sided specialists in one or other of its branches, before they had got a grasp of the general principles which govern them all. There is, of course, no theoretical obstacle that stands in the way even of Private International Law, which is the narrowest of the three branches, being taught in such a manner as that an absolute basis should be given to each doctrine, and science made to shine through it at every step. But, practically, we know that this would not be done, and that, if it were done, it probably would not be intelligible to those who had made no previous study of Jurisprudence as a whole. The same remarks apply to the Public Law of Nations with even greater force, because its rules are less definite, and from the want of any central authority by which they can be enforced, it leans even for its executive factor on the Law of Nature.

The most perfect arrangement, no doubt, would be that the present chair, embracing the three subjects in a single course, should be retained for purposes of general instruction, attendance on it being imperative for the LL.B. degree, and for the Bar, as at present, and extended to Writers to the Signet, a good many of whose apprentices have been voluntary students in recent years; and that, alongside of it, there should be established three separate courses, one on each of the three subjects, on which attendance should be voluntary. But such a scheme is far too ambitious for this country; and as regards the Philosophy of Law and the Public Law of Nations, at all events, we may at once dismiss the notion of their being established with such endowments as to induce men of ability to accept them, whilst at the same time the present chair is maintained.

The endowment of a lectureship on Private International Law, on the other hand, appears to me to be by no means an impracticable scheme. As it need not interfere with the professional prospects of the lecturer, it might be held by a succession of junior members of the Bar; and as it would demand no special gifts or acquirements which could not be turned to practical account, an endowment of £150 or £200 a year would probably be sufficient.

To the attempt to introduce separate courses of the Philosophy of Law and of the Public Law of Nations there are other objections, in addition to the financial one I have mentioned. A course devoted exclusively to the Philosophy of Law would, probably, drift away into those abstract and subtle metaphysical speculations the bearing of which on Positive Law is of too indefinite and disputed a kind to render them acceptable in this country, and which even in Germany, in recent years, have almost banished the subject from the academical arena. As regards the Public Law of Nations, a separate course, occupied as it must be in a great measure with the history of treaties and with the details of diplomatic arrangements, would be wholly useless except in conjunction with a school of diplomacy, the establishment of which in Edinburgh would be a matter of great if not insuperable difficulty.

For these and other reasons—amongst which I would mention the unsettling effect of all changes and the difficulty with which new institutions are established—it humbly appears to me that the wisest course would be to retain the existing chair very much on its present footing. Even if a lectureship on Private International Law were established, I would not relieve the Professor from the duty of teaching that subject, because, as Professor of Jurisprudence, it would belong to him to determine its scientific character, and, as Professor of International Law, to assign to it its place as a subsidiary doctrine to the fundamental doctrine of recognition.

But, if the present chair is to be retained with any reasonable guarantee for its permanent success, I have one word to say about it which I could not have said with equal freedom twenty years ago—*it must be better endowed*. No one can feel more keenly—few probably even of my many gifted pupils ever felt so keenly as I have all along done myself—how much was lacking to me in the qualifications demanded by the position which I occupied. I am very far from insinuating that my poor services have not been adequately remunerated, or that I had personally the slightest claim to the honour and consideration with which Continental nations and the Americans are in the habit of treating their international jurists. But I know the position, I know the high and rare qualities which its occupant ought to possess, and I say with-

out hesitation that no succession of men possessed of these qualities can be secured and retained on the conditions on which it has been held by me, still less on those on which it was held by my predecessors. Sir A. Grant has said of it that "it could only have been made attractive to the students by a man of genius who devoted himself to expounding the Philosophy of Law. Whereas the chair has been held by a succession of advocates who were engaged in successfully pushing their way to the Scottish Bench, and who naturally treated their academical position and duties as of minor importance. It is no wonder then that the chair was a failure."¹

A succession of men of genius can never be secured for any office. No chair in the University ever had that advantage, and it may be that no man of genius ever occupied the chair of Public Law at all, though, in the opinion of his contemporaries, Macdonochie, as we have seen, came very near to that character. Of Areskine, its first occupant, we know less, but it is hard to believe that a man who was a Regent of Philosophy at twenty-four, who seven years after chose as the subject of his inaugural address "God as the Fountain of Law," and who ended his brilliant professional career by rising to the second highest place on the judicial bench, was deficient either in the philosophical gifts or the energy of character requisite to have made him not only an efficient professor but a distinguished scientific jurist, had the inducement been sufficient. To both of these men the world-wide reputation and permanent fame enjoyed by men like Grotius, or even by such lesser lights as Alberigo Gentili, Puffendorf, or Vattel, must have had their charm. But the charm was not sufficient to compensate for the sacrifice of wealth and local consideration which it involved; and unless some means are adopted to diminish this sacrifice in future, no succession of able professors need be looked for, and Scotland can never take the place in Scientific Jurisprudence which belongs to her in virtue of the thoughtful and speculative genius of her people.

The claim for more liberal endowments and more generous recognition of this particular chair is strengthened by another consideration with which I shall conclude these remarks, which have already run to a greater length than I contemplated. General Jurisprudence and International Law are branches of science which must draw their nourishment almost exclusively from Continental sources. The professor of International Law must be himself an internationalist. He must not only know foreign languages and read foreign books, but he must know foreigners and foreign nations, otherwise he will see everything through the distorting medium of local feelings and prejudices. If he is an enthusiast in

¹ Vol. ii. p. 316.

his science, moreover, it is to his Continental colleagues that he must look for sympathy and companionship, and for escape from the intellectual isolation to which, for the present at all events, he will be here condemned. Having received a portion of my own education abroad, I had some advantages in these respects, and yet there is nothing I regret more than not having spent my holidays on the Continent during the earlier years of my tenure of the chair, and gone into academical and political society abroad to a greater extent than I did. When my Continental colleagues did me the honour of inviting me to take part in founding the Institute of International Law in 1873, a large increase took place in my Continental acquaintance, and this has led to much charming intercourse, both social and scientific. But I was by that time too far advanced in life, and my health was too shattered, to admit of my availing myself fully of the privileges they offered me. I have only been present at three meetings of the Institute, and have taken little part in its labours. Through its means, however, I have been brought into contact with all the leading international jurists of the day; and I am convinced that nothing is more important for a professor of the Law of Nature and Nations, be the sphere of his local activity what it may, than a constant interchange of publications and letters, and of occasional visits, with the class of men who constitute the members of the Institute. With a view to this, however, he ought to be in such circumstances as to render the expenses of his journeys and the immediate remuneration he may receive for his publications a matter of comparative indifference, and to enable him to return the hospitalities he will receive. In order that he may discharge his public duty in an efficient and becoming manner, he must be able both to travel abroad and to live at home like a gentleman; and it is not quite fair to expect that, in addition to sacrificing his professional prospects, he is to do all this out of his private means.

But, apart from all higher and wider considerations, there is an aspect of the affair which can scarcely fail to appeal to those who know the circumstances of many of the junior members of the Bar, from whose ranks the professors must necessarily be chosen. The whole emoluments of the chair, even including the £150 of Bishop's teinds recovered in 1881, have never, with the exception of the last and present sessions, quite reached £500. From a merely pecuniary point of view it is thus inferior to the smallest Sheriff-Substituteship; and whilst this continues to be the case, it is obvious that no man of ordinary prudence will accept it, unless he either has at the time, or, at all events, has the prospect of inheriting, some considerable amount of private means. It is a

conspicuous as well as an important appointment, which no conceivable increase to the size of the class can ever render self-supporting. To a poor man it would be a "white elephant," and the man and the elephant would starve each other. It is surely needless, in these democratic days, to enlarge on the disadvantages of thus limiting the area of choice to the comparatively wealthy.

XVIII.

THE FACULTY OF LAW.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1888.

(Reprinted from the *Juridical Review*.)

ON the 5th of January 1864 I delivered to the students of law in the University of Edinburgh generally, as well as to my own class, or *publice*, as it is called in Germany, an address on the "Sphere and Functions of an Academical Faculty of Law." That is more than twenty-four years ago, and these have not been years of involuntary silence or enforced inactivity like the fourteen years of Domitian's reign over which Tacitus sighed. If we have been silent or inactive the blame has been our own, and it seems fitting that we should inquire what use we have made of this *grande spatium mortalis aevi*. The views which I then presented, have they been rejected or accepted? And if accepted, to what extent, if any, have the aspirations which I cherished been realised?

It is to these questions, rather than to any re-discussion of the general Academical question, that I wish now to invite attention.

There are, as I then pointed out, and as I have often since remarked, three distinct conceptions of a Faculty of Law. Seen from the positive or practical side there is a twofold conception—a narrower and a wider one. In accordance with the first or narrower conception of it, which has hitherto mainly prevailed in this country, its function is to train legal practitioners, and its sphere is limited to jurisdiction. In accordance with the second, or wider notion of it, which prevails on the Continent, it embraces legislation as well as jurisdiction, and aims at the formation in the whole community of those legal conceptions of the various relations between human beings in their individual, their citizen, and their cosmopolitan capacities out of which positive laws arise. It seeks to train the lawgiver as well as the administrator of the

law. Beyond and behind both of these lies the ultimate or scientific conception of it as that branch of the Academical system, or *studium generale scientiarum*, which has for its object the discovery of those permanent and inevitable, though, alas! not inviolable laws which we call Natural Laws. All true Positive Law, as Mr. Burke has said, is "merely declaratory," and it is these Natural or Divine Laws that it declares. It is when seen from this point of view that the Faculty of Law takes rank with the other Academical Faculties, and derives nourishment from the organism of which it forms a part. "The proper study of mankind is man"; it is for his sake—with a view to the elucidation of his position in the universe and the guidance of his activity—that knowledge is sought after.

But man presents himself to the contemplation of mankind in various aspects, and the Academical system looks at him from various points of view. As I said on the occasion to which I have referred: "As the highest manifestation of mere animal life, man falls to the share of the Faculty of Medicine; as an isolated spiritual existence, he forms the noblest study of the Faculty of Arts; in his relation to his Creator, it is the sublime function of the Faculty of Divinity to deal with him; but as a social being, he is ours, and ours alone."¹

Now strange as, at first sight, it may seem, I have no hesitation in saying that, of the three conceptions of our faculty which I have mentioned, the last, or scientific conception of it, is that which has made the most satisfactory progress in the general mind during the period of my tenure of this chair. During these years there has been a growing tendency to abandon the arbitrary notion of Positive Law as something dictated by mere human ingenuity, and having no deeper source than human legislation. Men have begun to feel that social life, like life in general, is governed by ultimate laws which it belongs to science to discover, and which, when discovered, must be obeyed. The "effacing fingers" of utilitarianism, which had well-nigh obliterated every trace of scientific method from English Jurisprudence, have been arrested, and the task of unlearning, so needful to the disciples of Bentham and Austin, has been resolutely faced by the representatives of the rising school of Jurisprudence in the English Universities and the Inns of Court. Amongst ourselves the study of the *jus naturale*, and of its action as the ultimate factor in the development of the Roman Law, preserved, to some extent, all along, the scientific character of our jurisprudence and of our Faculty of Law. But the lamp of science burned feebly amongst us also till it was re-enforced from what I believe to have been the main source of the general revival—viz.

¹ Lecture I., ante, p. 10. *Law Magazine and Law Review*, Feb. 1864, p. 314.

the improved method of inquiry which has been adopted in other departments of knowledge. Nature, physical Nature more especially, has been examined more closely than at any previous period, and the result has been a marvellous accession to our conception of her laws, or, in other words, of the fixed and predetermined lines along which she works. How these lines were fixed or determined we know not, and indeed shall never know. The ultimate problem, not of the creation alone, but of the government of the universe, remains unsolved and insoluble. The most exhaustive discovery of the efficient causes of evolution leaves the final cause of it precisely where it was. Why was there ever any evolution at all, or anything to evolve? *Ex nihilo nihil fit* is as true as ever. We are told that it—this primary something—star-dust, protoplasm, or whatever it was, evolved and evolves itself by means of efficient causes, attraction, selection, and the like, and that this process has gone on through countless ages; and it seems to me that the latter part of this assertion is extremely probable. The noble army of investigators, of whom Darwin is the central figure, have brought the hypothesis of evolution, as regards physical existence, animate as well as inanimate, far nearer to demonstration than any of us who are old could have believed possible when we were young. Nor will most of us deny that Herbert Spencer and his followers have made a good beginning in explaining the progressive apprehension by the creature of the laws of his spiritual life. Consciousness and conscience are no longer regarded as full-grown faculties implanted in a ready-made soil. Hitherto untrodden paths of psychological, ethical, and philological archæology have been opened up; and if the results obtained in these directions have not been in all respects entirely trustworthy, they have been sufficient to justify the method which has yielded them. Our own Professor Laurie here claims special notice. His higher and more accurate philosophical culture has enabled him to tread in the dreaded but inevitable region of metaphysics with a security which few of his English fellow-workers can feel, and when his "*Metaphysica, nova et vetusta*" and his "*Ethica*," or the *Ethics of Reason*, come to be better known, a unique position amongst students of spiritual evolution cannot fail to be assigned to him. Those who look at the phenomena of existence exclusively from the physical side have no true conception of what they owe already, and may hope for in future, from the class of investigators to which Professor Laurie belongs, and whom it is the object of Lord Gifford's Bequest¹ to call into activity. It is upon faith in the universal presence of reason that they, too, must fall back in the last instance; nay, that is the ever-present sub-

¹ For the endowment of lectureships in Natural Theology in the four Universities of Scotland.

sumption at each step of their advance. Chaos could never produce Cosmos, even with the aid of undetermined force. We cannot evade the postulate of reason. Physical science affirms as emphatically as either theology or philosophy that there was logic (ὁ λόγος) in the beginning, and logic in this, the widest and truest sense of it, is God. By widening the range of human insight the physicist has thus been playing into the hands of the metaphysician and the theologian, who differ from him mainly in this, that they are somewhat more grateful for the gifts which they mutually bestow. If I may be permitted to take my distinguished colleague, Professor Flint, as an exponent of the scientific theology of our time, I believe I could name no one who more thoroughly appreciates the advantages which theology has derived from the progress of physical science, and in proof of this assertion I need only call to memory the admiration with which men like Helmholtz, Virchow, and Pasteur listened to the magnificent discourse which he delivered in St. Giles's Cathedral on the occasion of the Tercenary Celebration of our University in 1884.

But have the investigators of physical science played equally into the hands of the scientific jurist as into those of the psychologist and the theologian? To this my affirmative answer must be given with some qualifications. It is in the sociological direction, with which we are most concerned, that the tendency to rash assertion and generalisation has unfortunately been most conspicuous. Laws of development or evolution, at variance with that very principle of sexual selection on which so much stress is laid, have been hastily assumed to govern whole stages of progressive human existence. The *homo sapiens* has been supposed to be destitute of the social instincts with which his hirsute forefathers have been credited, and modes of life have been ascribed to him which they had repudiated. A very small amount of that knowledge of mankind of which students of man from the physical side are so frequently destitute would have sufficed to convince them that promiscuity, and still more, polyandry, never prevailed as *institutions* at any stage of progressive existence, and that, even at periods of national retrogression, however prevalent they may have been, they were abnormal and exceptional irregularities. On this ground it is indirectly only that the study of sociology, so far as it has yet gone, has aided the study of scientific jurisprudence.

But whilst repudiating the exaggerated claims on our credulity which have been occasionally made by its indiscreet exponents, let us not forget what we, as students of jurisprudence, owe to the scientific spirit of our time. It has confirmed our faith in nature as a reasoned organism, and in the reason by which it is organised. It has vindicated the universal prevalence of law, and in so doing

it has restored our belief in the continuous action of that factor in the formation of positive law, which the Stoics, and the Roman jurists after them, called the *jus naturale*. Unwittingly and unintentionally the cultivators of physical science have slain the utilitarians and left the scientific jurists in possession of the field. Directly and consciously, however, they have done nothing to assist in its cultivation. On the contrary, amongst the causes which have impeded the progress of scientific jurisprudence and its ancillary studies has been the exclusive interest which the physicists have attracted to themselves and their investigations. It has been an age of physical science,—so much so, indeed, that science and physical science have become synonymous terms. The vast preponderance of the resources of our University, and of the numerous gifts and bequests that have been made to it, have been devoted to physical science. A magnificent palace has been built exclusively for its uses. Men of the highest ability have been attracted to its service, and retained in it by honours and emoluments far beyond those which have been bestowed upon any other class of scientific labourers. In this state of matters it was not wonderful that the sphere and functions of the Faculty of Law should have been almost wholly forgotten. In the narrower of the two practical conceptions of it, which I mentioned as a training-school for the interpreters and administrators of the law, it has remained stationary; whilst in the wider conception of it, as a training-school for legislators and for a self-legislating community, it has made little progress. Still, if the wind has been against us, the stream has been with us. If our progress has been slow, it has been in the right direction, and men's minds are prepared for the forward bound which we hope may result from the labours of the promised Universities Commission. By rendering graduation the rule of admission to the profession, in place of the rare exception, as it was for many years after the institution of our present law degrees, and by giving to candidates the option between conveyancing and political economy, we have done all, or nearly all, that is within the reach of our present powers. If we are to do more we must not only have ampler powers, but more liberal conditions for their exercise. What is wanted is a department of the University, a school, like the school of Medicine, devoted to social and political and jural studies, and so organised as to take them up at once from the historical and statistical, and from the philosophical, point of view. Such a school of Law, like our school of Medicine, would attract students from every part of the Empire, and assert for itself a European position, whereas the influence of our present Faculty of Law can scarcely transcend mere local limits.

One of the greatest defects of this University, and much more of the other Scottish Universities, as I have often said, is the almost entire absence of any provision for the teaching of history. It is not that the study of history has stood still in our time. On the contrary, with the single exception of physical science, there is no branch of knowledge which has received so much attention, and there is scarcely a single direction in which it has not been prosecuted by specialists with important and, in many cases, marvellous results. But the gratification of curiosity, or the support of some preconceived theory in politics, economics, or religion, has often had more to do with it than the hope of being able to appreciate the present more justly or to obtain guidance for the future. Mindful that the conditions in which principles were realised in former times can never recur, men have forgotten the principles which were permanent, and the action of which had merely been impeded or arrested by evanescent causes. It is on this ground, I believe, that the impression has arisen, that, however interesting the history of Antiquity or the Middle Ages may be, it is needless for practical purposes to go further back than to the Reformation for our religious and to the French Revolution for our political opinions. By these great upheavals it is supposed that old things were swept away, and mankind started on newly-laid rails for a new race. Now to suppose that new principles of progressive existence are revealed by such destructive cataclysms as these is just as absurd as to expect to discover a new style of architecture by blowing up an old house. The house, whilst it stood, might have taught us something, but the explosion was inarticulate, and the ruins are mute. In order to learn anything we must reconstruct the house, in imagination at any rate. Till this has been done, we can neither appreciate its beauties and conveniences, nor detect its faults and defects. In like manner, if we would discover the principles of progressive existence which had carried mankind up to the point they had reached when the catastrophe occurred, we must go back not only beyond the catastrophe, but beyond the period of decadence and disorder which led to its occurrence. We must seek our new starting-point in an historical period before the minds of men were unhinged and bewildered by the fierce passions and violent antagonisms which invariably precede such tragical occurrences. *Il faut reculer pour mieux sauter*, and we must take our leap far enough back to carry us over the débris occasioned by the breakdown of the previous life. As illustrating what I mean, let me mention that it is in the earliest literature of the Aryan race that the sources have been found of the whole of the present religious movement in India. In like manner it is the problem of the schoolmen—

the reconciliation of faith and reason,—and not the problem of the Reformers and Puritans—the rendering of faith independent of reason—with which our modern theologians are occupied. However irrational Roman Catholicism in its later manifestations may seem to us, our spiritual sympathies are drifting more and more in the direction of Thomas Aquinas and Abélard, and away from Luther and Calvin. The heroic battle which these latter fought against corruption and superstition must ever claim our admiration and our gratitude; but we are estranged by their dogmatism, and I doubt whether in the whole literature of the Romish Church anterior to Loyola a passage could be found more at variance with our present forms of thought than Luther's exclamation, "Strangle reason, like a dangerous beast, if it dare to question Scripture."

It is the same in the political sphere. Next year, 1889, is the centenary of the French Revolution. Our neighbours are looking forward to what they themselves characterise as *une débauche de la liberté*. The whole hideous story will be gone over once more, and even on this side of the Channel it is to be feared that there are writers and orators who may find a sort of ghastly satisfaction in repeating it. But everything must have an end. I am not without hope that we shall then have heard the last of it, and that a constructive century may succeed the destructive century through which we shall then have lived. But if the work of construction is to be entered upon, it will not be to the traditions of the Revolution that we must look for inspiration. It is the judgment of Zeus, "which gives to the greater more, and to the inferior less, always, and in proportion to the nature of each; and above all, greater honour to the greater virtue, and to the less less, and to either in proportion to their respective measure of virtue and education,"¹ and not the judgment of Rousseau, that men must be made equal, however great may be their inequalities, which we must accept. It is this, the equality of the Stoics and the Roman jurists, the *proportion* of the Middle Ages, and not the *égalité* of 1789, which is the permanent principle,—the law that never grows old. It is in the fuller and more perfect realisation of this principle, and not in the substitution for it of any new principle, that we must strive to outstrip our ancestors. That much unconscious progress has been made in this direction by the wider charity and more active sympathy of the last and present generations of our countrymen I most thankfully recognise. But all unconscious progress is apt to be one-sided; and whilst the rights of the non-propertied classes have been recognised with a fulness hitherto unknown, there has been a tendency on their part to forget their corresponding obligations, which has been

¹ See Lorimer's *Institutes of Law*, p. 408.

encouraged by injudicious, and it is to be feared not always disinterested, partisanship. I may be partial to my own calling, but it appears to me not unreasonable to suppose that the balance between interests which appear to conflict would be more evenly held by a scientific jurist, who had nothing personal either to hope or to fear, than by a party politician, who, for his own sake and that of his party, must accept the opinion most likely to commend itself to the majority of voters.

In seeking to determine the true function of a Faculty of Law, I have by no means in view solely the benefit of jurists and professional lawyers. My remarks have reference largely to a class of persons more numerous in our profession than in the others: I mean those whom wealth and leisure permit and invite to devote themselves to public affairs. It is from this class that our politicians have been hitherto and will, I trust, continue mainly to be taken, and they alone are in a position to study politics as a science and to follow it as a calling. It is on their behalf, consequently, that I chiefly claim an extension of the sphere of the Faculty of Law; but it is not with a view to their interests as a class, apart from the rest of the community, that I claim it. It is not our governors so much as our servants whom we desire to train. The free state must be self-governing. It must be the ultimate sovereign, the monarch, and this in a constitutional monarchy just as much and more, I think, than in a republic, because "wire-pulling" is less easy. But, like other sovereigns, the sovereign community must have its ministers, and to them it must delegate the duty of recognising and declaring as well as of administering its laws. For the training of this class of public servants our own University already offers many advantages, and were the Faculty of Law developed in the political direction, might confer inestimable benefits on the whole Empire. Looking at the matter from the Scottish point of view, not only would the University itself be a gainer, but a substantially new career would be opened to our Scottish gentry at their own doors. It is an open secret that the supposed necessity of sending their sons, those of them more especially who are destined for public life, to be educated in England, imposes a burden on many of the best families in Scotland which, in the present state of their affairs, they are ill able to bear. In order to facilitate this arrangement, sacrifices have to be made which weaken the hold it is so desirable these families should retain in the localities to which they belong. Their establishments have to be reduced, their hospitalities curtailed, and in many cases their paternal abodes let to strangers, whilst they themselves become strangers in their turn. In ten or fifteen years of non-residence a substantially new generation

springs up ; new associations arise, new relations are formed, the spell of proprietorship is broken, and when the young laird comes amongst his own people he brings little along with him save an old name, to which less and less importance is being attached every year. His own sympathies and affections, moreover, are with the friends of his youth. The all-important fifteen years from ten to twenty-five have made an Englishman of him. Patriotic sentiments which he utters from time to time have a hollow sound from his lips, and *nolens volens* an Englishman he continues to be to the end of his days. If these disadvantages were counterbalanced by any real educational gain, the heroic sacrifices made to obtain it would demand our admiration and sympathy. But the gain, to persons of this class in particular, is extremely problematical. The refinement of manners, and the greater purity of speech, which are supposed to result from an English education, they already possess by inheritance. Whatever may be the case with the sons of the *nouveaux riches*, the sons of our impecunious nobility and gentry take with them to Eton and Oxford the manners which the others are expected to bring away, and furnish the passports to society and to public life which the others go to seek. What they themselves want is not social gifts and graces, but a thoroughly substantial all-round education—classical, mathematical, philosophical, and historical—which will stand them in good stead in after years ; not an education to talk about, but an education to use ; and I doubt whether there be any course of instruction which fulfils this character more completely than the curriculum for the degree of M.A. in a Scottish University. I do not speak of honours. What I refer to is the ordinary pass-degree which we exact as preliminary to the degree of Bachelor of Laws. The degree of LL.B. itself, even in the present condition of our Faculty, I hold to be unquestionably as good a guarantee for political capacity as any other which this country supplies.

It is quite true that the secondary schools of Scotland, for many years past, have not been all that could be wished. That their defects as regards mere instruction, however, have been much exaggerated, is proved by the fact that they have been all along in a condition to send up pupils who were able to pass the preliminary examination for entrance to the three-years' curriculum for the M.A. degree, not by any means of an elementary character. The arrangements which are being made for the new "leaving examination" will, no doubt, equalise, and thus raise the average standard of attainment. The rude and clumsy manners, with which the pupils of these schools are sometimes reproached, are due, I believe, to the almost total withdrawal of the sons of the

more cultivated classes. It is thus rather a fault to be corrected than a fact to be deplored, and it is a fault the correction of which these classes have in their own hands. If the representatives of our historical families had become idle, luxurious, and self-indulgent, the separation of their children from those of the rest of the community might have been a gain to the latter at any rate. But, as matters stand, they are for the most part the hardiest and most spirited and energetic section of our whole population, and it is much to be regretted that they do not mingle with their youthful fellow-countrymen at a period of life when their influence would be greater than it can possibly be in later years. Nor need any serious difficulties be apprehended from the intermixture of youths of the same race and blood, even where the disparities of rank are very great. Schoolboys soon get over these barriers to their intercourse, and kindred sympathies prevail over and correct pride on the one side, and shyness or jealousy on the other. When the French princes were sent to the High School of Edinburgh, in order that they might have the benefit of Dr. Schmitz's tuition in 1859-60, they were extremely popular with their class-fellows, and much attached to several of them. They were not *incogniti*. No farce was made of not knowing who they were. But their titles were dispensed with, they entered the class with perfect confidence and simplicity, and took places in the ordinary way. Though the Rector of the High School at this period was, no doubt, a very exceptional person, there was nothing exceptional in the organisation of the school itself which specially favoured this experiment. The provincial grammar-schools of Scotland, which are similarly organised, are the oldest of our educational institutions. Several of them had attained importance centuries before the High School was founded, and before we had any universities at all. It was in them that many of our early scholars who distinguished themselves on the Continent learned the Latin for which they were so famous, and the present generation of Scotsmen seem thoroughly alive to the necessity of their resuscitation. Much has already been done, and is being done, in order to bring the whole system of secondary education in Scotland up to the requirements of the time; and if those classes from whom our politicians have hitherto been mainly taken are to preserve their hold on the country, it is high time that they should assume the position in this movement to which they are so well entitled. But they cannot do so, so long as they stand aloof and send their own sons to be educated in England, as if they feared that they should be contaminated by the touch of their fellow-countrymen. The gilding of a *jeunesse dorée* that cannot stand that amount of friction is not good for much. Let our old gentry take courage. Scot-

land has not forgotten her past. She is not the senselessly democratic country that they sometimes imagine, and they themselves enjoy more favour than they suppose. It is a hopeful sign for them, moreover, that they are most popular in those districts in which, from the moderate size of their estates, they are most numerous and best known. But the attractive qualities which they exhibit in after life never wholly remove the estrangement caused by separation in youth, and much of the influence which early contact would give them is irretrievably lost. They have no old friendships and early associations to fall back upon extending beyond their own class. They are not Scotsmen, in short, in the full national sense, and it is difficult to see how they can ever become so otherwise than by availing themselves of the higher educational institutions of the country, and adapting them to their requirements and their tastes.

XIX.

THE CHURCH AND THE BAR.

Introductory Lecture delivered to the CLASS OF PUBLIC LAW,
November 1889.

THE close kinship between theology and jurisprudence was felt and acted on long before either of them became an object of science, or had even received a definite name. On the first dawning of reason—as soon as there were men at all—they appear to have become rudely and vaguely conscious of the fact that they were subject to the same power by which the forces of external nature were governed, that life and death came to them unbidden, from the same Hand which made day and night, summer and winter. Nor did they fail to extend this conception to the relations in which they stood to each other during their brief sojourn on earth. They accepted, as wholly independent of their will, the fact that they had been created male and female, and to this great central characteristic of their physical and moral being they ascribed the inevitable ties which bound them together. When a child was born it stood to its parents in a relation of dependence over which neither he nor they had any control; and this relation branched out into consequences, which, though less obviously, were in the end equally inevitable. It was thus that arose the law of *status*, which, on its objective side, ultimately begot the law of *contract*, and the rude and simple arrangements by which laws were enforced. There was as yet no distinction between the organs of legislation, jurisdiction, and execution. The father of the family, the head-man of the village, the chief of the clan, the leader of the host, was prophet, priest, and king. Temporal power, even in the hands of an usurper, was recognised as the emblem of Divine authority, and he who held it as the exponent of absolute will, whether he spoke from the altar, the judgment-seat, or the throne. At this early stage theology and jurisprudence were identical. The one dealt with the relations of man to God, the other with the relations of man to man; but their exponents and their ministers were the same.

The second stage was that of distinction and separation. As human affairs increased in complexity, the dicta of that absolute will by which they were governed in the last instance became less explicit, and the sphere of proximate will was widened. Nor was this proximate human will always coincident with ultimate Divine will. It took abnormal as well as normal directions, and these frequently of so subtle and hidden a kind as to call for the intervention of a special class of expositors: so the function of the lawyer became separated from that of the priest. But even when a separate class of jurists arose they were invariably taken from the priestly caste. The office of the secular judge was only a special function of the priesthood, and down even to a late period in the history of all the nations of Europe the clergy retained the regulation of family life, more especially, in their own hands. The law of *status* belonged to the ecclesiastical courts, and though the executive power came to be centred in the secular head of the State, he exercised it mainly as the servant of the Church. His warrant arose from his double character as head both of Church and State, and his warrant, as thus founded in the nature of things, was revered as Divine. To the law, which was indirectly discovered and judicially declared, the same sacred character was ascribed as to that which claimed to be directly revealed, and theology and jurisprudence still went hand in hand for the fulfilment of God's law upon earth. To go to law was to appeal to God.

But separation of functions speedily led to separation of objects, and the third stage, that of opposition between sacred and secular interests, was reached. The Church and the State now drifted apart. The clergy, finding the spiritual interests of the community endangered by the influence of material considerations and the unfettered exercise of their proximate volition, sought to bring them back to a sense of their dependence by reminding them of the brevity of the present life and the worthlessness of their temporal possessions when time, for them, should be ended. Taking the words of Christ in their literal acceptation, they taught them that the Kingdom of Heaven was not of this world, and that it was to be found, not by doing their duty honestly as men and citizens, but by withdrawing themselves from temptation and living in continual contemplation of the world to come, with which the Church professed to possess an exceptional acquaintance. Dogma and ritual for which scarcely any authority was to be found in Scripture took the place of the ethical teaching of Christ. Implicit belief, not only in the supernatural and preternatural traditions which had grown up around the history of Christ's marvellous life during the first and second centuries, but

in the additions which the Church had made to them in later times, were substituted for faith in the Divine revelation of God's Fatherly will which commended itself to human consciousness and stood in no need of external proof. In order to secure a separate standpoint that would enable it to hold its own against the Roman jurisprudence, which stood over against it as a secular gospel founded upon the *jus naturale*, the Church asserted the infallibility of its teaching, and protected it by the terrors of excommunication and everlasting perdition. It was at this point that theology lost its hold upon science, or, to speak more correctly, at which it quitted the lines along which, in its earlier and simpler form, it was tending in the direction of science. The clergy, who hitherto had been merely the members of the community who occupied themselves with its spiritual as opposed to its material interests, now became a separate class, with interests of their own distinct from, and often opposed to, those of their fellow-citizens. By a series of efforts, differing, of course, in different localities, but possessing the same general character, and having the same objects in view, the Church shook off the fetters of the State and succeeded in carrying off from it no small share even of the riches of this world. When this process had been completed, the Roman Catholic Church stood out in independent dignity and grandeur, and *for once the idea of a Free Church, the same idea which floats before the ecclesiastical imagination of the advocates of disestablishment and denationalisation in our own day, was realised.* At times the Church more than held its own, and the establishment of a Theocracy seemed almost within its reach. The Christian Scriptures, it is true, gave no support to this aggressive attitude, Christ having expressly accepted the secular system of jurisprudence under which He lived. But the gospel of Christ was one thing, and the gospel of the clergy was quite another thing, and when the Bible had once been withdrawn from the laity it became as arbitrary and exclusive as the Corân. It taught nothing but what the interests of sacerdotalism required it to teach, and thus an *imperium in imperio*, which repudiated all interference even with its material interests, arose.

But the civil power was not always willing to "go to Canossa," and as the theocratic system hardened itself in the one direction, a secular system sprang up in the other which acknowledged no deeper source than proximate human volition. *Vox populi* was accepted, not as a synonym but as a substitute for *Vox Dei*, utility took the place of natural law, and utility being whatever circumstances for the time being appeared to dictate, jurisprudence, like theology, lost its hold upon nature and its rank as a science. Forgetful of their common origin in that Fatherly will which

human intelligence, guided by the Divine λόγος, had been striving to trace from the dawn of consciousness, and which in the fulness of time had been proclaimed with a clearness and consistency hitherto unknown, they formed themselves into two opposing systems of human dogmatism bearing scarcely any relation either to nature or to each other. So matters stood, in their general outlines, when the first great intellectual and moral upheaval shook modern Europe. The work of the Reformation, when we look at it apart from its side-issues, was to bring the clergy and the laity, the Church and the State, theology and jurisprudence, once more together. In all the countries in which the Cosmopolitan Free Church was broken up National Churches were established, the clergy again became citizens of the State, potent as the custodians and expositors of the national creed, but subject to the jurisdiction of the civil power in all temporal matters, even in those which related to the Church itself. The ecclesiastical courts, it is true, were not abolished, and still arrogated to themselves the branches of jurisprudence in which religious and ethical considerations more obviously furnished the determining elements, but even here the judges, who were not always ecclesiastics, exercised their functions as officials of the State, not of the Church, and their sentences were executed by the civil power in its own name, and not, as formerly, in name of the Church. There was no longer any thought of rivalry between hierarchy and monarchy; and Church and State, in Protestant countries at all events, worked into each other's hands for the common good. Such was the theory of the Reformation as regarded this matter, but practically it proved to be a mere transference of the intellectual and moral leadership from the Church to the State. A secular learned class sprang up, and the old conflict between the representatives of the spiritual and the material interests of the community was renewed, with this difference, that the national churches were no longer able to cope with the national governments, and to assert for themselves an independent position, as the Cosmopolitan Church had done. The national churches accepted the situation, not always perhaps without some degree of reluctance. But a host of sectaries gradually appeared, who endeavoured again to shake themselves free from the State, either by the adoption of a pompous ritual which appealed to the senses, or of a narrow creed which appealed to the fears of the people and gave more prominence to God's hatred of sin than to His love of righteousness. The one class drifted into superstition, the other into fanaticism. The laity for the most part listened without remonstrance to doctrines which, had they really believed them, would have filled them with terror and dismay, and unfitted them for the

performance of all secular duties. But they did not believe them. What was preached on Sunday was not practised on Monday even by the clergy themselves, and what came of it all was that men were deprived of the guidance and support which they would have derived from a creed more in accordance with their natural instincts. An elaborate and complicated system of doctrine appealing almost solely to the supernatural elements which had found their way into the Gospels, and partially traceable in St. Paul's Epistles, thus obscured the ethical teaching of Christ Himself. Men were not yet bold enough to appeal to the revelation of nature, and to mark the coincidence of its teaching with that which was fundamental in Christianity, and which they themselves actually believed. The revolutionary era was too shallow to admit of any serious resumption of the old scholastic problem, of the reconciliation of faith and reason, and the sham philosophy of Rousseau and his followers rested on a diagnosis which directly reversed the facts of nature.

It was not till our own day that the very remarkable change of sentiment occurred which promises to bring theology and jurisprudence into harmony with each other, and to bind Church and State together by bringing them back to their common source at the very moment when, from sectarian jealousy, and envy, and party rivalry, the outcry for their separation has become louder than ever. On this occasion, if I mistake not, it is to science that we shall owe a step in advance on the road which has been so often found and so often forsaken; and what is curious is, that it is physical science which, somewhat reluctantly, promises us this result. When the observational method had finally established the uniform action of law within the sphere of physical nature, and belief in an exceptional intervention of creative power for religious or moral purposes became impossible, those whose faith in the Divine revelation had rested on supernatural evidence naturally became alarmed. If God manifested Himself only as the Author of unchangeable physical laws, the action of which could be traced by the external senses, what proof was there that He had established moral laws for the guidance of human life, or that these laws were equally unchangeable? If such laws existed, where were they to be found? If the ten commandments had not been written on tables of stone by the finger of God, what proof was there that they came from God at all, or were of universal validity? Moses might have derived them from utilitarian considerations, applicable only to the very peculiar circumstances of his own countrymen. The suggestion that for "tables of stone" must be read the "human heart" was repudiated, not only as destitute of philological warrant, but as leaving law still de-

pendent on human testimony. If God had created the world, why, it was asked, should He not be credited with power to proclaim His will thus emphatically by external means? But if the suggestion of an internal revelation derived no support from biblical criticism, there was another direction in which learning came unexpectedly to its aid. Something very closely analogous to the ten commandments, and altogether identical with the golden rule, was found to exist, and to have existed for ages, in the religious systems of all the higher races of mankind. When Christianity came to be studied from a comparative point of view, it was discovered, moreover, that what was peculiar to it, what distinguished it from and raised it above all other religions, was not its miraculous source, to which they all laid claim, but the exceptional importance which it gave to the revelation through nature. It was the ethical religion *par excellence*, the religion which appealed, not less than the others but more than the others, to internal evidence. The Sermon on the Mount with which Christ began His teaching, and which occupies three long chapters of St. Matthew's Gospel, was an ethical discourse of such majesty and simplicity, so searching and so exhaustive, as to find no parallel elsewhere. Well might the astonished people say that "He taught as one having authority, and not as the scribes." The same character belongs to the whole of His subsequent teaching, whether direct or in parables. On the three occasions on which He was asked to condense His doctrine by specifying the leading commandments,¹ His reply was always to the same effect,—to love God (that is, reverentially and joyfully to accept the facts of nature), and to love our neighbours as ourselves. Christianity is no system of exclusive altruism as opposed to the egoism of classical antiquity, as has been so often said of late, and so stupidly, in both directions. It is a religion of common-sense, in which the laws of human intercourse are laid down, and the lines of moral progress are indicated, by which subjective and objective interests may be more justly balanced. The will of the Father which Christ revealed was the scheme of Divine government, in so far as it is applicable to humanity and realisable by human effort. The proof of its authenticity—the only proof of which it stood in need—was its coincidence with the fundamental instincts of man. Christ as the son of man, or typical man, was at the same time the Son of God and the connecting-link between the Divine and the human.

Here then was the common source of theology and jurisprudence, of Church and State. On the common ground of the ethical conception of Christianity, clergy and laity join hands in a common

¹ Cf. Matt. xxii. 37, *et seq.* ; Mark xii. 28, *et seq.* ; Luke x. 25, *et seq.*

effort for the realisation on earth of the Kingdom of Heaven. The means which they employ and the regions which they cultivate are different, but their object, viz. to bring the proximate human will into harmony with the ultimate Divine will, and to make this common will the mainspring of present action, is the same.

And now I come to the practical suggestions with a view to which I have made the preceding remarks. The two fields of labour which I have just indicated are, it appears, very unequally manned. Whilst the legal vineyard is overstocked with efficient and willing husbandmen, there are scarcely enough of them to keep the theological vineyard in cultivation. The flower of our students, those most gifted by nature and favoured by fortune, flock to the Bar, whilst the Established or, as I prefer to call it, the National Church, of which alone I speak in this connection, is left too much to those against whom circumstances have closed the more popular career. These men enter the Church often, it is to be feared, not from any lofty sense either of its sacred character or of its social importance, but because it offers them a means of living more immediate and secure, if less brilliant, than any secular occupation that is open to them. If this were a division of mere secular labour, by which the poor and the weak were favoured at the expense of the rich and the strong, it would be in accordance with the equalising spirit of the time, and perhaps it might be right. But it is not so. What actually occurs is that a class of men whose independent position would render them invaluable in the National Church find no field of usefulness at the Bar, and after years of enforced idleness and weary and dispiriting waiting, enfeebled in energy if not degraded in character, either betake themselves to other occupations or vegetate during the remainder of their days on their scanty private means. In either case the services to their country which they were once so much in a condition to render are lost. True, if they can find no employment on the practical they may go into the theoretical side of their own profession. We are more in want of scientific jurists than we are either of parsons or of legal practitioners, in order to put us on a footing of equality with other countries. But jurisprudence carried back to first principles enjoys no favour amongst us. It is when seen from a theological and not from a jurial point of view that ethical speculation finds its way to the general mind. Beyond academical walls the pulpit is the only vantage-ground from which the discussion of first principles is tolerated, even when they bear on secular affairs. Parliament will have none of them, and hence the haphazard and hand-to-mouth character of our legislation—of our “leaps in the dark.”

During the twenty-seven years that I have occupied this chair,

I have seen many gifted and accomplished men go to the Bar, whom, for their own sakes and for the sake of others, I would gladly have seen go into the National Church, and I have often asked myself, and asked them too, why it is that they appear to shun what in itself is the noblest of all the professions. The common answer is that they cannot conscientiously accept the creed which the Church imposes on her ministers. The reason is one which does them credit, and so long as it remains unchanged will no doubt continue to drive away from the altar many of whose services it stands much in need. But it is a reason which the Church created and which the Church can remove, and if what I have said of the altered conception of Christianity be true—and be true, as I believe it to be, within the Church itself—I have no doubt that the National Church of Scotland, at all events, will remove it at no distant date. Free churches and sectarian churches may hold on to absolute creeds, and the Church of Rome, at all events, we cannot doubt, will continue to do so. If it ceased to be stationary its *raison d'être* would cease. But a National Church must keep pace with the progress of thought and learning in the nation. It must keep in touch with the spirit of the time. It must analyse and criticise contemporaneous opinions from absolute and permanent points of view, if it would purify them from the fallacies and half-truths, from the fads and fancies, which grow like weeds in the soil of each generation, and which nourish and feed the zeal of party strife and theological controversy. When this occurs, a new career of the highest dignity and usefulness will be opened to a class of men to whom, from various causes, the Law must always be an *arida nutrix*.

From a material point of view it may be thought that the Church of Scotland would prove even a less bountiful mother than the Bar. But this is not wholly so. It is true that she has no great worldly prizes to offer, but the modest provision which she makes for her clergy, when supplemented by the private means without which no sensible man comes to the Bar, would furnish such a measure of well-being as ought to content any one whose heart was in his work. It would enable him to enter into family relations far earlier in life than is generally possible even for those who eventually succeed at the Bar, and would thus secure to him the brightest period of married life. Though it might shut him out from fortune, it need not shut him out from fame. On the contrary, it would open to him a sphere, not only of moral but of intellectual activity, far wider than the Bar or even Parliament has to offer to those who work on the practical side of affairs. The theologian may claim on even higher grounds the portion assigned to the poet in Schiller's celebrated ode—

"The Earth, said the Thunderer, is portioned away,
And I cannot reverse the decree,
But the Heavens are mine and the regions of day,
And their portals are open to thee."

The difficulties and annoyances attendant on popular election have probably exercised a deterrent influence on persons of modesty and refinement, who might otherwise have entered the Church, equal to, if not greater than, the narrowness of the creed. Personally I should share this feeling to so great an extent that I cannot but regard the adoption of this method of admitting men to the sacred ministry as a disaster for the Church and for religion itself. But, belonging as I do to a more sensitive and fastidious generation, it is not for me to judge of an arrangement which is in full accordance with the spirit of the time. Those who belong to the time must accept the conditions of activity which it offers them; and the Church in this respect, though it contrasts unfavourably with the Bar, does not impose harder terms than the legislature. A parochial canvass may be more unbecoming than a parliamentary canvass, but it has, at any rate, the advantage that it costs less. If conducted between persons to whom its material results were comparatively indifferent, it would be freed at once from the odious features which are apt to belong to it when it comes to be a mere struggle for bread.

There is a last objection to the Church of Scotland as a profession which I mention with reluctance, but, as it weighs for more than it ought to do with the class of men who usually come to the Bar, I must not pass it over. It is what Charles the Second embodied in his malicious saying that "Presbyterianism is not a religion for a gentleman." My reply is that, if true at all, it is least true in the case of those who are gentlemen already, and that if a sufficient number of them would enter the Church it would soon cease to apply to the Church altogether. I am far from undervaluing the importance of the qualities which attach to the fine old conception of a gentleman, or from ignoring the fact that they are not always found in the Presbyterian clergy of the present day. But I wholly deny that their presence is inconsistent with the exercise of ministerial functions in accordance with the Presbyterian form of worship or of church-government. Nor do I believe that gentlemen of the right kind would fail to find favour with the people. As popular education advances, the appreciation of æsthetic culture in the clergy and their surroundings will spread to an ever-widening circle, and the manse will be looked upon as the appropriate abode of the Graces as well as of the Virtues. It will be felt that the beautiful is twin-sister to the good, that, as Victor Hugo has said, "*Le beau est aussi utile que l'utile : plus peut-être.*"

APPENDIX.



APPENDIX.

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INDEX.

INDEX.

- ABERCROMBY, GEORGE**, third Professor of Public Law, 229.
Absenteeism, evils of, 250, 253.
Academical Faculty of Law. *See* Faculty of Law.
Acollas, E., 69.
Advocates' Library, shortcomings of, 40.
Agriculture, not mere food-producing industry, 165, *et seq.*
 — generally not remunerative, 203.
Ahrens, Cour de Droit Naturel, 40.
Alabama case, 97, 101.
Alison, Sir Archibald, 133, 134.
Allah, Mahometan conception of, 138, 140, 141.
Altruism and egoism, 259.
Ambition, uses of, 182.
America, North. *See* United States.
Anarchy and despotism, 27.
Aquinas, Thomas, 103.
Arabs, "sole recipients of revelation," 150.
Arbitration, International, 32, 79, 85, 86, 87, 88 *et seq.*
 — requisites of, 99.
 — probably inapplicable to Eastern Question, 100, 122, 125, 128.
 — beyond sphere of positive law, 159.
Areskine. *See* Erskine.
Argentine Republic, payment of Members of Parliament in, 217.
Aristocracy, merits and demerits of, 68.
Aristotle, influence of, on Professor Lorimer, xii.
 — founder of political science, 11, 12.
 — Ethics and Politics of, 137.
Asser, Professor, 82.
Austin, doctrines of, xiv, 244.
Australia, payment of members of legislature in, 217.
Austria, war between Prussia and, 25 *et seq.*
Austria, result of possession of Constantinople by, 125, 126.
Aytoun, Professor, estimate of his character, 17 *et seq.*
BACON, LORD, 49, 52.
Baker, ex-Colonel, 147. -
Balance of power, 30, 32.
Balfour, James, fifth Professor of Public Law, 230, 231.
Bar, Scottish, 16.
 — Church and, 254 *et seq.*
 — overstocked, 260.
 — Church in some cases preferable to, 260, 262.
 — education for, 208, 224.
 — members of, in Parliament, 220.
Belligerency, characteristics of, 37.
Belligerents, attitude of neutrals towards, discussed, 115 *et seq.*
 — right of capture at sea by, 108 *et seq.*
Bentham, xiv, 60.
Bernard, Professor Mountague, 86.
Besobrasoff, M., 82.
Blockade of Southern ports of United States a mistake, 36, 37.
Bluntschli, Professor, 81, 86, 94, 107, 115.
 — criticism of Professor Lorimer's system by, 157.
 — views of, on union of European states, 160, 161.
Bondholders, Turkish expedient for payment of, 131.
British Association, address of Sir Lyon Playfair to, 192.
Bruce, Robert, fourth Professor of Public Law, 230.
Brussels, meeting at, for "establishment of International Code," 85, 86.
CALVO, C., 81.

- Canada, payment of members of parliament in, 217.
- Canterbury, Archbishop (Tait) of, 180.
- Capture at sea by belligerents, right of, defended, 108 *et seq.*
- Carlyle, 70, 73.
- Carrières ouvertes*, 73.
- Carstairs, Principal, and Lord Stair, probable originators of Chair of Public Law, 225.
- Centralisation and decentralisation, 192 *et seq.*
- centripetal and centrifugal action of, and decentralisation, 196.
- and decentralisation, antagonistic yet progressive, 197, 198.
- when it ceases to be beneficial, 199, 212; and becomes disastrous, 200, 201.
- decentralisation rather than, now desirable, 202, 203, 212.
- tendencies of, in international affairs, 203-207.
- tendencies of, in Church and State, 204, 205.
- Chaos and cosmos, no debatable land between, 214.
- Christ, Gospel of, 256, 259.
- Christianity, true evidence of, 259.
- Christians in Turkey, 130, 131.
- Church, Roman Catholic, 204, 256.
- idea of a free, *ib.*
- establishment of national, 257.
- conception of a national, 260, 261.
- of Scotland as a profession, 260, 262.
- Church and State, originally identical, afterwards separated, 254-258.
- Church and Bar, 254 *et seq.*
- — separation of, 255, 256.
- — judges originally clergymen, 255, 257.
- — prospect of restored harmony of, 258-260.
- — as careers compared, 260-262.
- Cicero, unity of law demonstrated by, 42.
- Citizens, how far State responsible for conduct of, 111, 116, 117, 118.
- Civilisation of Mahometans, 129.
- Civil Service, Faculty of Law affords training for, 14.
- Class, distinctions of, in America, Great Britain, and Prussia, 22, 23.
- Classics, prospects of, 196.
- Clergy, Gospel of the, 256.
- Presbyterian, 260, 262.
- Cockburn, Lord, estimate of Allan Maconochie's character by, 232.
- Codification of International Law, 86, 87.
- Comitas gentium*, 155.
- Commons, political classification of, 24.
- position of Members of House of, 68; compared with House of Lords, 184, 185. *See also* Parliament.
- Communism and communalism, 180-182.
- Confederation, tendencies of, 29.
- Congress, payment of members of, 217.
- International, proposed, 59 *et seq.*
- Congresses, International, composition of, 128.
- Conservatism, true mission of, 20.
- Constantinople, denationalisation of, 121 *et seq.*
- possession of, by Russia, Austria, etc., discussed, 125, 126.
- suggested as seat of International Government, 130.
- consular courts at, 144.
- Constitution, Turkish, a farce, 142.
- Constitutional Government, conduct of foreign affairs under, 161, 162.
- Consuls, Faculty of Law affords training for, 14.
- Contraband of war, proposed prohibition of, trade in, 93.
- Contract, law of; its influence on family, 179.
- Co-operation in family, 181.
- Corân, not an ethical basis for a political superstructure, 132 *et seq.*
- ethics of, 138 *et seq.*
- immorality and intolerance of, 141.
- Suras of, 141.
- Cosmos and chaos, no debatable land between, 214.
- Country, advantages of living in, 165 *et seq.*, 203.
- Courts, consular, in semi-barbarous countries, 144.
- Craigie, Robert, letter of Lord Advocate Erskine to, 228.
- Creasy, Sir Edward, 105.
- DAHLMANN, PROFESSOR, influence of, on Professor Lorimer, xii, 53 *et seq.*
- Decentralisation, centralisation and, 192 *et seq.*
- now desirable, 202, 203, 212.

- De facto* Principle, 155, 160.
 Degree of LL.B., requisites for, 237, 238.
 — guarantee for political capacity, 251.
 Degree of M.A., Scottish and English, compared, 237; excellence of Scottish, 251.
De jure, recognition, 155.
 Democracy, impossibility of, 56, 57, 70.
 — monarchy, and republicanism, 67 *et seq.*
 — characteristics of, 211, 215.
 Democratic and monarchical tendencies, not the only political forces, 26.
 Denationalisation of Constantinople suggested, 121 *et seq.*
 Descartes, 52.
 Despotism and anarchy, 27.
 Diplomacy, objects of, 79.
 — objections to secret, 160, 162.
 Diplomats, errors of, 58 *et seq.*
 — Faculty of Law affords training for, 14.
 Disraeli, B., *Tancred* quoted, 150.
 Divorce, favoured by the Corân, 139.
 Duke of York, order of the day by, regarding quarter, 134.
 Dundas, Robert, associated with Stair and Carstairs, 226.
 Duties and rights reciprocal, 194.
 Duty, fact the source of, 155.
- EASTERN QUESTION, arbitration probably inapplicable to, 100, 122, 125, 128.
 Education, position of classics in, 196.
 — political, 208 *et seq.*
 — of Scotchmen in England, evils of, 250-253.
 — of Turks, 129.
 Egoism and altruism, 259.
 Elective system, conduct of foreign affairs under, 162.
 Electorate, tendencies and deficiencies of, 202, 209.
 Elphinstone, Bishop, founder of Faculty of Law, 223.
 Empire, French, anomaly of, 65.
 Endowment, importance of adequate, 15, 21.
 Enlistment, acts against foreign, 36, 88 *et seq.*, 111, 145, 146.
 — of neutral citizens, suggested rules as to, 119, 120.
- Enlistment of citizens in foreign service, whether preventible, 146, 147.
 Equality, doctrine of relative and absolute, 11, 12.
 — impossibility of absolute, 56, 57, 70.
 — of nations, principle of, unsound, 59.
 — of States, doctrine of, 127.
 — doctrine of relative, 155, 156.
 — erroneous doctrine of, basis of communism, 180.
 — doctrine of proportional, 249.
 Erskine, Charles, first Professor of Public Law, 226-229.
 — character of, 229, 240.
 — John, a professional, not a philosophical author, 41, 42, 47 *et seq.*
 Ethics and politics, 34.
 — of Aristotle, 137.
 — sole basis of politics and jurisprudence, *ib.*
 — of Mahometanism, 138 *et seq.*
 — laws of, 194.
 — basis of law, 198, 208, 214.
 Europe, federation of, 30, 32.
 Evolution in study of law, 148, 245.
 Examinations and lectures, attendance on, must not be carried too far, 13.
 Exclusiveness in society, causes of, examined, 21-24.
 Executive power, conduct of foreign politics by, 161, 162.
- FACT, source of right, 154.
 — source of duty, 155.
 — measure of right and duty, *ib.*
 Faculty of Advocates, importance of, 38.
 Faculty of Law, academical, sphere and functions of, 3 *et seq.*
 — — ought to embrace science of man in relation to the external world, 10.
 — — ought to teach all who are occupied with social science, 14.
 — — affords training for statesmen, consuls, diplomatists, and Civil Service, *ib.*
 — — development of, 15.
 — — importance of better endowment of, 15, 21.
 — — should be developed in political direction, 219.
 — — in Scottish Universities, 223.
 — — proposed curriculum in, 224.

- Faculty of Law, position and sphere of, 243 *et seq.*
 ——— practical and scientific conception of, 243, 244.
 ——— influence of physical and metaphysical studies on, 245, 246.
 ——— should embrace social and political studies, 247.
 ——— importance of history in connection with, 247-249.
 ——— importance of political teaching by, 250.
 ——— preparatory education for, 251-253.
- Family, idea of, in modern society, 177 *et seq.*
 ——— Mr. Herbert Spencer's views as to, 177, 178.
 ——— position of women in, 179, 180.
 ——— individualism, communism, and communalism distinguished, 180-183.
 ——— hereditary principle, value of, 183, 187.
 ——— effect of distribution of land on, 187-190.
 ——— historical sentiment connected with, 190, 191.
 ——— growth and expansion of, 198.
- Field, Dudley, 82, 86.
- Finality, principle of, unsound, 59.
- Fixity of tenure, dishonestly sought, 190.
- Flint, Professor, on the Corân, 141.
 ——— as an exponent of scientific theology, 246.
- Food produced by land not sole criterion of its value, 165 *et seq.*
- Foreign Enlistment Acts, complications caused by, 36, 88 *et seq.*, 111.
 ——— unworkableness of, 145, 146.
- France, decadence of, predicted, 54 *et seq.*
 ——— significance of defeat of, 62.
 ——— empire in, anomalous, 65.
 ——— prospects of renewed war between Germany and, 136.
 ——— centralisation in, 201.
 ——— payment of senators and deputies in, 217.
- Franco-German War, 53 *et seq.*, 62 *et seq.*
 ——— arbitration inapplicable to, 100.
- Fraternity and Paternity, principles of, 62 *et seq.*
- Freedom of Action, object of jurisprudence, 157. *See also Liberty.*
- Freeman, Professor, 145.
- Free Trade between neutrals and belligerents advocated, 90.
- French princes at High School of Edinburgh, 252.
 ——— Revolution based on principle of fraternity, 63, 64.
- GENTILI, ALBERIGO, 102.
 ——— influence of, 225.
- Gentry, position and prestige of, 184-186, 191.
 ——— training and education of Scottish, 250-253.
- German War of 1866, 25 *et seq.*
 ——— its causes and results, 26 *et seq.*
 ——— illustrates importance of ethnological element, 29.
 ——— illustrates action of centrifugal and centripetal forces, *ib.*
 ——— illustrates principle that positive law must be brought into conformity with new facts, *ib.*
 ——— and the balance of power, 30, 31.
- Germanic Confederation, 25, 29, 30, 33.
- Germany, unification of, predicted, 25.
 ——— significance of victory of, 62.
 ——— belief of, in paternal principle, 63, 64.
 ——— noblesse of, 64, 65.
 ——— result of possession of Constantinople by, discussed, 125.
 ——— prospects of renewed war between France and, 136.
- Ghent, Institute of International Law founded at, 77 *et seq.*
- Gibbon, 124.
- Gladstone, Mr., views of, as to study of jurisprudence, 102.
- God, Mahometan conception of, 138 *et seq.*
- Goldschmidt, Professor, project of, for International Arbitration, 97, 98.
- Göttingen, the seven professors expelled from, 53.
- Government, different forms of, 69.
 ——— requisites of, 129.
 ——— cannot be based on the Corân, 141.
 ——— forms of, in relation to International affairs, 161, 162.
- Gospel of clergy and Gospel of Christ, 256, 259.
- Grant, Sir Alexander, 105.
 ——— *Story of the University of Edinburgh* quoted, 225-227, 230, 233, 240.

- Greg, W. R., 114.
 Grotius, 50, 59, 77.
 — influence of, on Scotland, 225-227, 229.
 — Compendium of his *De Jure Belli et Pacis*, by William Scott, 226.
- HAMILTON, ROBERT, seventh Professor of Public Law, 234.
 — Sir W., influence of, on Professor Lorimer, xi, 52.
 Heraclitus, saying of, 197.
 Hereditary principle, value of, 182-187.
 — what qualities may be, 183, 184.
 High School of Edinburgh, French princes at, 252.
 History, province of, 12, 13.
 — basis of civilisation, 222.
 — importance and defective teaching of, in the Scottish Universities, 247-249.
 Hobart, Captain, 146, 147.
 Holland, University education in, and in Scotland compared, 193.
 Holland, Professor, 102.
 Holtzendorff, Professor von, *Handbuch des Völkerrechts* by, 206.
 Home Rule, objects of, 202.
 — sphere of, discussed, 213-215.
 House of Commons, position of members of, 68.
 — compared with House of Lords, 184, 185. *See also* Parliament.
 House of Lords, functions of, 67, 68.
 — compared with House of Commons, 184, 185.
 Hugo, Victor, on *Futile*, 262.
- INDEPENDENCE, alleged, of nations, 204, 206.
 India, position of Mahometans in, 129.
 Individualism, tendency towards, 179, 183.
 Innes, Professor Cosmo, 236.
 Institute of International Law, 77 *et seq.*, 143.
 — founders of, 81, 82, 241.
 — statutes of, 82 *et seq.*
 Insurrection, repression of, 134.
 Interdependence of nations, true basis of International Law, 204, 206.
 International Arbitration, 79, 129.
 International Code, proposals for, 85, 86.
 International Congress, proposed, 59 *et seq.*
 International Congress, composition of, 128.
 International Jurisprudence, 102 *et seq.*
 International Law, teaching of, 12.
 — based on national law, 57, 58.
 — Institute of, 77-87, 143, 241.
 — central question of, 122.
 — ultimate problem of, 126.
 — how far it can be administered as a positive system, 127, 131, 159.
 — system of, sketched, 148 *et seq.*
 — scientific character of, 152, 153.
 — recognition, fundamental doctrine of, 155.
 — object of, 156.
 — how far analogous to municipal law, 158.
 — position of professors of, on the Continent, 233, 239.
 — scope of public and private, defined, 236, 238-240.
 — lectureship on private, 238, 239.
 — qualifications of a professor of, 239, 240.
 — Chair of. *See* Public Law.
 International significance of recent events, 52 *et seq.*
 International tribunals, whether possible, 59-61, 80, 87, 96.
 — powerlessness of, 97, 98.
 — desirability of, 126, 128.
 Intervention prevented by Rules of Washington, 89.
 Investment in land disadvantageous, 188-190.
 Islām. *See* Mahometanism.
- JAMES IV., Statute of, quoted, 223.
 Jeffrey, Lord, evidence of, as to Chair of Public Law, 232, 233.
 John Bull, inaptitude of, for theory, 212.
 Jones, Ernest, utterance of, 203.
 Judaism, defects of, 150.
 Jurisprudence, sphere of, 12.
 — science of, 37 *et seq.*
 — unity of branches of, 42.
 — based on Ethics, 137.
 — scientific investigation necessary in, 151, 154.
 — perfection object of, 156.
 — object of, 198.
 — embraces politics, 211, 219.
 — teaching of, proposed by Bishop Reid, 224.

- Jurisprudence, study of, in Scotland, 225.
 — school of, in Scotland, 226.
 — as taught by Allan Maconochie, 234.
 — scope of, defined, 236, 239, 240.
 — relation of theology to, 246, 254 *et seq.*
 — International, 102 *et seq.* *See also* International Law.
 Jurists, English and Foreign, 102 *et seq.*
 — English, 104-107.
Jus gentium and *jus inter gentes*, 158.
Jus inter gentes based on *jus gentis*, 57, 58.
Jus naturale, study of, 244, 247. *See also* Natural Law.
 KANT, definition of science of law by, 38.
 — views of, as to jurisprudence, 39, 59.
 — definition of positive law by, 195.
 Kirkpatrick, William, second Professor of Public Law, 229.
 Knowledge, scientific, 193-195.
 Korân. *See* Corân.
 LAND, question of, in social and political aspects, 164 *et seq.*
 — food produced by, not sole criterion of value of, 165 *et seq.*
 — residential value of, 168, 170.
 — objections to leasehold tenure of, 171.
 — ownership preferable to tenancy of, 172.
 — objections to accumulation of, 168, 173, 174.
 — judicious distribution of, 175, 176.
 — distribution of, 187-190.
 — a disadvantageous investment, 188-190.
 — different tenures of, discussed, 201, 202, 203.
 Land Laws, whether alteration of, required, 175.
 — amendment of, discussed, 181, 182, 187-190.
 Laurie, Professor, works by, 245.
 Laveleye, Professor de, 82.
 Law, true source of, xiv, xv.
 — practice distinguished from science of, 8, 9.
 — science of, defined, 10.
 — different branches of, 12.
 Law, positive, must be modified according to fact, 32, 33.
 — science of, 38.
 — of nature and nations confounded, 40.
 — writers of books on, 41.
 — Lord Stair on the study of, 42.
 — scientific study of, in England, 103, 105.
 — revelation and evolution of, 148.
 — municipal, how far analogous to international, 158.
 — of nature and nations distinct from public law, 164.
 — degrees in, proposed by the Reformers, 224. *See also* Degrees.
 — chair of, founded by Lords of Session and others, *ib.*
 — evolution in study of, 245.
 Law of Nations. *See* International Law.
 Law of Nature. *See* Natural Law.
 Law, Philosophy of. *See* Natural Law.
 Law, Public. *See* Public Law.
 Laws, scientific, 194, 195.
 Lawyer, profession of the, 208, 209.
 Lawyers, characteristics of the greatest, 49, 50.
 Lectureship on Private International Law, 238, 239.
 Legislation, whether a remedy for unequal distribution of wealth, 75.
 — how to be provided for, 208, 209, 211.
 — should be governed by principle, 212, 214.
 — functions of imperial and local, 213, 215.
 — private bill, 220.
 — within sphere of Faculty of Law, 243.
 Legislators, training of, necessary, 208 *et seq.*
 Leviathan, of over-centralisation, 213.
 Liberty and order, 21, 23.
 Lincoln, President, 37.
 Lords, House of, functions of, 67, 68.
 — compared with House of Commons, 184, 185.
 Lorimer, James, character and early education of, ix *et seq.*
 — estimate of his works, xiii *et seq.*
 — eighth Professor of Public Law (appointed in 1862), 235.

- Lorimer, James, task assigned to, by the Universities' Commissioners, 235, 236.
 ——— task undertaken by, 236, 237.
 ——— one of the founders of Institute of International Law, 241.
 Luther, denunciation of reason by, 249.
 Lyon Office and Heralds' Colleges, 191.
 Lytton, Lord, address of, at Glasgow, 153.
- MACONOCHE, ALLAN, sixth Professor of Public Law, 231-234.
 ——— character of, described by Lord Cockburn, 232.
 Mahomet, immorality of, 141.
 Mahometan, prayer of a, 140.
 Mahometans in India and Europe, 129.
 Mahometanism, ethics of, 138 *et seq.*
 ——— hostile to civilisation, 139.
 ——— cannot form basis of sound government, 143.
 Mancini, Professor, 81, 107.
 Maritime capture, doctrine of, 108 *et seq.*
 Meadowbank, Lord, first and second, 234.
 Members of Parliament, payment of, discussed, 216 *et seq.* See also Parliament.
 Migration and emigration, 167.
 Mill, J. S., views of, on political and social science, 11, 12.
 Minister, career of, in Church of Scotland, 260, 262.
 ——— objections to popular election of, 262.
 Monarchs, hereditary, compared with elective Presidents, 184.
 Monarchy, republicanism, and democracy, 67 *et seq.*
 Montesquieu, influence of, 234.
 Montrose, Marquis of, love-song by, 178.
 Moral Law. See Ethics.
 Moslems. See Mahometans.
 Moynier, M., 82.
 Muir, Dr. John, 138.
 ——— Sir William, 138 *et seq.*
 Munitions of War, suggested rules as to trade in, 118, 119.
- NATIONAL CONVENTION, barbarous decree of, 133, 134.
 Nationality, principle of, 29.
 Nations, not equal, 59, 127, 155, 156.
 ——— not independent but interdependent, 204, 206.
- Natural Law, sphere of, 12, 37 *et seq.*
 ——— erroneous notions as to, 39.
 ——— not to be confounded with international, 40.
 ——— scope of, defined, 236, 239, 240.
 ——— popularity of, with Scottish students, 237.
 Neutrality, characteristics of, 37.
 ——— duty of testifying benevolent, 54.
 ——— proclamations of, objectionable, 90, 91.
 ——— especially if binding on citizens individually, 92, 93.
 ——— Laws, 115.
 ——— principles of, examined, 115 *et seq.*
 ——— proclamation of, 145.
 ——— definition of, 145, 146.
 Neutrals, interests of, 90 *et seq.*
 Neutral States, responsibility of, for conduct of their citizens, 111, 116, 117, 118.
 New Zealand, payment of members of legislature in, 217.
 Nobility, Prussian and English contrasted, 23, 24.
 ——— ought not to be exclusive, 64, 65.
 Noblesse in Germany, 64, 65.
 Noblesse oblige, true meaning of, 20.
- OPTIMISM, in politics, 197, 209.
 Order and liberty, 21, 23.
 Ottoman Empire. See Turkey.
 Ownership, joint, in family, 181.
 Oxford, study of Aristotle at, 137.
- Parieu, M. de, 113.
 Paris, Treaty of, 123, 144.
 Parliament, Members of, system of electing, 209, 210.
 ——— professional Members of, desirable, 211.
 ——— unequal to strain now put upon it, 213, 214.
 ——— payment of Members of, 216-219, 220, 221.
 Parties, political, complementary to each other, 21.
 Paternity and Fraternity, principles of, 62, *et seq.*
 Peace Society, 89.
 Peasant Proprietors, objections to, 170.
 ——— how far desirable, 201, 203.
 Peerage, advantages and prestige of, 184-186.

- Perfection in relation, object of jurisprudence, 156.
 — defined, 157.
 Philosophy, importance of, to lawyers, 48 *et seq.*
 Philosophy of Law. *See* Natural Law.
 Playfair, Sir Lyon, address of, to British Association, 192.
 Pledges, morality of, 35, 36.
 Plutocracy, valuable accession to gentry, 188.
 — when rendered useless, 215.
 Political Economy, chair of, in Faculty of Law, 13.
 Political Science, 11, 112, 113.
 — — value of, 219, 220.
 — — should be embraced by Faculty of Law, 247.
 Politics, different tendencies in, 20, 21, 26.
 — and ethics, 34.
 — impropriety of pledges in, 35, 36.
 — science of, 112, 113.
 — foreign, remedy for irresponsible conduct of, 128.
 — of Aristotle, 137.
 — based on ethics, *ib.*
 — scientific investigation necessary in, 151, 154.
 — conduct of foreign, 161, 162.
 — influence of landed interest on, 176.
 — central problem of, 197.
 — international, 203-207.
 — as a profession, 208 *et seq.*
 — organisation necessary in, 209, 210.
 — function of trained politician, 211.
 — importance of principle in, 212, 213.
 — imperial and local, 213-215.
 — whether profession of, should be paid, 216-221.
 — should be taught by Faculty of Law, 219.
 Polygamy, maintained by the Corân, 139.
 Population, questions as to distribution of, 165 *et seq.*
 Porte, Sublime. *See* Turkey.
 Positive Law, definition of, by Kant, 195.
 — — how far International Law can be, 127.
 Positive School, basis of, 157.
 Prayer, a Mahometan, 140.
 Prévost-Paradol, 54 *et seq.*
 "Primitive Contract," 39.
 Primogeniture, whether abolition of law of, desirable, 175.
 Prisoners of War, rules as to, 133 *et seq.*
 Prolegomena to a Reasoned System of International Law, 148 *et seq.*
 Proletariate, evil of, 74.
 — how far to be remedied by legislation, 75, 76.
 Profession of legislator and politician, 243, 247, 250.
 — Bar as a, 260-262.
 — Church as a, 260, 262.
 Professor, province of, 3.
 — of Law of Nature and Nations, 240. *See* Public Law, Chair of.
 Property, accumulation and distribution of, 71 *et seq.*
 Proportional Equality, doctrine of, 249.
 Prussia, political condition of (in 1865), 23.
 — distinction of classes in, 23, 24.
 — war between Austria and, 25 *et seq.*
 — observations on, 27, 28.
 — payment of members of Second Chamber in, 216.
 Public Law defined, 164, 231, 236.
 Public Law, Chair of, story of the, 222 *et seq.*
 — — probably originated by Lord Stair and Principal Carstairs, 225.
 — — occupants of, down to 1832, 227-235.
 — — causes of their failure, 227, 230, 232, 233, 235, 237.
 — — sale of chair, 229, 230, 232, 233.
 — — appointment of James Lorimer to the (in 1862), 235.
 — — subjects assigned to: Public Law, Natural Law, Public and Private International Law, 236.
 — — importance of philosophical part of subject taught by, 237.
 — — future position of, 238-241.
 — — inadequate endowment of, 239.
 — — qualifications for tenure of, 239, 240.
 — — sphere and emoluments of, 240, 241.
 Public Opinion in France and Great Britain, 55, 56.
 — — in International affairs, 160.
 Punishment of insurgents, 134, 135.

- QUARTER, barbarity of refusing, 133 *et seq.*
 — Duke of York's order of the day regarding, 134.
 Queen Victoria, character of, 67.
- REASON, Luther's denunciation of, 249.
 Reasons for the study of jurisprudence as a science, 37 *et seq.*
 Recognition of Turkey imperfect, 144.
 — doctrine of, 155, 160.
 — relative, 155.
- Redcliffe, Lord Stratford de, on the Eastern Question, 128.
- Reformation, theory of, as to Church and State, 257.
- Reid, Bishop of Orkney, attempts to introduce scientific jurisprudence, 224.
- Religion as taught by the Corân, 138, 142.
 — present position of, 204.
 — ethical, 259.
- Representation, proportional, 113.
 — international, 160.
- Republicanism, monarchy, and democracy, 67 *et seq.*
- Republics, presidents of, compared with monarchs, 184.
- Responsibility of State for private conduct of citizens, 111, 116, 117, 118.
- Revelation of Law, 148.
 — "vouchsafed to Arabs," not to Europeans, 150.
- Reverence, an important element in English character, 114.
- Revolution, doctrines of, 56, 57.
 — based on principle of fraternity, 63.
 — false doctrines of, 65.
 — French, erroneous principles of, 249.
- Right of capture at sea, 108 *et seq.*
 — of search, 119.
 — fact source of, 154.
- Rights and duties reciprocal, 194.
- Röder, Professor, on philosophy of law, 39.
- Rogers, Professor Henry Wade, on law and political science, 219.
- Rolin-Jacquemyns, biographical notice by, xvii.
 — founder of Institute of International Law, 79, 107.
- Roman Catholic Church, aim of, 204.
 — Empire, aim of, 204.
- Rousseau, judgment of, 249.
- Rules of Neutrality suggested, 117-120.
 — of Washington, 89 *et seq.*, 111.
- Russia, aims of, 124, 126.
 — possession of Constantinople by, discussed, 125.
 — war between Turkey and, 132 *et seq.*
- Rusticity and urbanity, 200.
- SACERDOTALISM, 256.
- Saxony, payment of members of Parliament in, 217.
- Schiller on the poet's destiny, 262.
- Schools in Scotland, merits and defects of, 251, 253.
- Schools of Jurisprudence, positive and negative, 39.
- Science, legal, social, political, 8, 11.
 — importance of ethical and political, 34.
 — of jurisprudence, 37 *et seq.*
 — jurisprudence a department of, 151, 154.
 — definition of, 193.
 — what embraced by, 194, 195.
 — erroneous limitations of, 196.
 — physical and metaphysical, as contributing to jural, 245-247.
 — undue preponderance of physical, 247.
 — political, should be embraced by Faculty of Law, 247.
- Scotland, jurisprudence in, 225, 226.
 — University education in, and in Holland, compared, 193.
- Scott, William, regent in University of Edinburgh, probably candidate for Chair of Public Law, 226.
- Scots Law Society, address to, 192 *et seq.*
- Search, right of, 119.
- Selborne, Lord, 105.
- Self-government, requisites of, 201.
- Sheik-ul-Islam, prayer of, 140, 141.
- Ships, right of belligerents to capture, 108 *et seq.*
- Slavery perpetuated by the Corân, 139.
- Smith, Adam, 112.
- Social science within sphere of Faculty of Law, 10, 11, 14, 244, 246.
- Society, advantage of gradations in, 21, 22.
 — political classification of, 24.
 — idea of the family in, 177.
- Sociologists, views of, on family, 177, 178.
- Solidarité*, principle of, 63, 73.
- Soto, Dominic, 103.

- Spencer, Herbert, views of, on family, 177.
 — — — merits of, 245.
 Stair, Lord, 37, 42, 48, 49.
 — — — influenced by School of Grotius, 225.
 — — — and Principal Carstairs, probable originators of Chair of Public Law, *ib.*
 State, Church and, 254-258.
 "State of nature," 39.
 States, principle of equality of, unsound, 59, 127, 155, 156.
 — — — interdependent, not independent, 204, 206.
 Statesmen, Faculty of Law affords training for, 14.
 Statute Law, sources of, in Scotland, 38.
 Stevens, Thaddeus, views of, as to blockade of Southern ports, 36, 37.
 Stowell, Lord, 50.
 Students of Public Law, position and character of, 237, 238.
 Suarez, Francesco, 103.
 — — — *Defensio fidei* by, 186.
 Suffrage, proportional, 113.
 — — — female, 179, 180.
 Sultan, position of, 130.
 — — — complaint of, as to position of Turkey, 144.
 Suras of the Corân, 141.
 TACITUS, 121.
 Tenures of land, 187-190.
 Theocratic systems, 149, 150.
 Theology, relation of to Jurisprudence, 246, 254 *et seq.*
 Town, disadvantages of living in, 165 *et seq.*
 Towns, growth of, 198.
 — — — causes and results of overcrowding in, 199.
 — — — life in, 165 *et seq.*, 200.
 Trade, suggested rules as to, for neutrals, 117, 120.
 Treaties, violation of, 30, 35.
 — — — unsatisfactory as basis of positive International Law, 205.
 Treaty of Paris, 123, 144.
 — — — of Utrecht, 30.
 — — — of Vienna, 30, 33, 58.
 — — — of Washington, 88 *et seq.*
 — — — of Westphalia, 30, 33.
 Trendelenburg, influence of, on Professor Lorimer, xii.
 Tribunals, International. *See* International Tribunals.
 Turkey, independence of, guaranteed by Treaty of Paris, 123.
 — — — views of Professor F. de Martens regarding, 124, 125.
 — — — denationalisation of, suggested, 129, 131.
 — — — Christians in, 130, 131.
 — — — war between Russia and, 132 *et seq.*
 — — — hopeless condition of, 135, 138, 142.
 — — — constitution in, a farce, 142.
 — — — foreign courts of law in, 144.
 — — — not fully recognised by Treaty of Paris, *ib.*
 — — — anomalous position of, 145-147.
 Turks, condition of the, 129.
 — — — ethics of the, 138 *et seq.*
 — — — explanation of bad faith of, 142.
 Twiss, Sir Travers, 106.
 — — — *Law of Nations* by, 206.
 UNITED STATES, society in, contrasted with English, 22, 23.
 — — — error of, in blockading Southern ports, 36, 37.
 — — — war between the Northern and Southern, 42.
 — — — blockade of Southern ports of, *ib.*
 — — — payment of members of congress in, 217.
 Universities, prospects of the Scottish, 193, 196.
 University, sphere of, 4 *et seq.*
 — — — education in Scotland and in Holland, 193.
 University of Edinburgh, foundation of, 6.
 — — — Chair of Public Law in, 222 *et seq.*
 Urbanity and rusticity, 200.
 Utilitarianism, 52.
 — — — futility of, 104, 105.
 — — — declining in England, 244.
 Utility, John Bull governed by, 212.
 Utrecht, Treaty of, 30.
 VENICE united with Italy, 25.
 Victoria, character of Queen, 67.
 Vienna, Treaty of, 30, 33.
 Votes, plural, 113.
Vox populi—vox Dei, 31, 208, 209.

- WALLACE, D. Mackenzie, 144.
 War between Prussia and Austria, 25
 et seq.
 War between Russia and Turkey, 132
 et seq.
 War, causes and effects of, 100, 101.
 — cannot always be prevented by
 arbitration, *ib.*
 — rules of, as to quarter, 133 *et seq.*
 — laws of, disregarded by the Turks,
 133, 140, 142.
 Washington, Three Rules of, 88 *et seq.*
 — Treaty of, *ib.*
 Wealth, distribution of, 71 *et seq.*
- Westphalia, Treaty of, 30, 33.
 Westlake, John, Q.C., 105, 114.
 — — on payment of Members of
 Parliament, 220, 221.
 Whately, Archbishop, political views of,
 35, 36.
 Women, position of, in family, 179,
 180.
 Working-classes in town and country
 contrasted, 166.
 YEOMANRY, importance of, 201, 202.
 ZEUS, judgment of, 249.

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 10/12/05

